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In the Supreme Court of the United States

October Term, 1961

DAVID D. BECK, *Petitioner*

vs.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CHARLES S. BURDELL
WILLIAM L. DWYER
Counsel for Petitioner
929 Logan Building
Seattle 1, Washington

FRATT PRINTING COMPANY

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DAVID D. BECK, *Petitioner*

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UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

I. JURISDICTION

A. Opinions Below

No opinion was written by the District Court. The opinion of the Court of Appeals is reported at 292 F.2d p. 622. This opinion is reproduced in the appendix hereto.

B. Abbreviations Used Herein

The pretrial proceedings (other than pretrial exhibits consisting of newspaper and magazine clippings) are contained in a printed Transcript of Record. References to this Transcript are designated herein by the abbreviation R.

The Trial Court ordered that the Transcript of the trial proceedings be submitted to the Court of Appeals in typewritten form. References to the typewritten Transcript are designated herein by the abbreviation Tr.

This case involves alleged violations of § 145(b) of the Internal Revenue Code (26 U.S.C. § 145(b)). The counts of the indictments which charged violation of these counts are designated herein as the "tax evasion counts." The case also involves alleged violations of § 3793(b)(1) of the Internal Revenue Code (26 U.S.C. § 3793(b)(1). This section defines the offense of making false returns for tax exempt organizations. This form of return is frequently referred to as a form 990 return. The counts involving this statute are referred to herein as the 990 counts.

C. Nature of the Case

Petitioner was convicted in the District Court on four counts of tax evasion and two counts of procuring and making false 990 returns.

The Court of Appeals reversed the convictions and granted a new trial on the tax evasion counts but affirmed the counts which charged the procuring and making of false 990 returns.

There were two indictments, joined for trial. R. 3, 435. Two counts, charging conspiracy to evade taxes, were severed for trial and are not involved in this Petition. One count charging the procurement and making of a false 990 return for the year 1951, was dismissed by the Government at the commencement of the trial. Tr. 237.

D. Date of Judgment Sought to be Reviewed

On February 27, 1959 Petitioner was adjudged guilty on the aforesaid counts and was sentenced by the District Court to imprisonment for a period of five years on each count, the sentences to run concurrently, and was fined the sum of $10,000.00 on each count.

The opinion of the Court of Appeals was filed on March 7, 1962.

E. Denial of Rehearing and Extension of Time

After argument in this case in the Court of Appeals, the Court withheld the decision pending the decision of this Court in *James v. United States*, 366 U.S. 213. Following that decision the Court of Appeals ordered reargument. Upon reargument Petitioner contended that the conviction of Petitioner on the tax evasion counts should be reversed or, in the alternative, that a new trial should be granted on these counts. Petitioner also contended that the conviction on the 990 counts should be reversed and a new trial granted because, in the light of the *James* decision, the evidence consisted almost entirely of alleged acts of embezzlement and other misconduct on the part of Petitioner, none of which related to the 990 counts; and Petitioner argued that it would have been impossible for the jury to have separated this highly prejudicial evidence from the minimal portion of the evidence which related to the 990 counts.

In its decision after reargument, the Court of Appeals granted a new trial on each of the tax evasion counts but affirmed the 990 counts. The Court did not discuss Petitioner's contention that a new trial should be granted on the 990 counts.

Thereafter, a Petition for Rehearing was submitted to the Court of Appeals and this Petition was denied on March 7, 1962.

On March 26, 1962 this Court extended to April 30, 1962 the time for the filing of this Petition.

F. Statutory Jurisdiction of This Court

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254 (62 Stat. 928).

G. Questions Presented for Review

A principal question in this case is whether the United States, while conducting criminal proceedings against one of its citizens, may, in Congressional proceedings, simultaneously and with knowledge of the criminal proceedings, expose the citizen to public contempt and disgrace and publicly assert his guilt. This question, to our knowledge, has not heretofore been decided by this Court. The vital importance of this question to the integrity of judicial proceedings is apparent, and its application is not limited to the Petitioner in this case.

Specifically, the questions sought to be reviewed are:

Question No. 1

While the United States is conducting grand jury proceedings directed against a specified person, does the Constitution (and particularly the Fifth and Sixth Amendments thereto) permit the United States, with notice of such proceedings: to accuse and degrade the citizen; to require him to continually assert a Constitutional privilege which is regarded by the public as an admission of guilt;

to assert that he is guilty of crimes; and to disseminate such accusations, assertions and proceedings by all types of news media in the area where the grand jury proceedings are being conducted?

Question No. 2

When criminal proceedings brought by the United States are pending against a citizen, and where such proceedings include secret grand jury sessions and secret deliberations, and the selection of jurors with respect to whom subconscious influences cannot be measured, and when the United States simultaneously degrades and asserts the guilt of that citizen in public Congressional proceedings, is the burden upon the accused citizen to prove by direct evidence that the public accusations and declarations of guilt, disseminated by and as a result of the Congressional proceedings, have affected the judicial proceedings?

Question No. 3

When criminal proceedings brought by the United States are pending against a citizen, and after an indictment against the citizen has been returned, may the United States prevent the citizen from exercising his right to a speedy trial by the continued widespread and intensive publication of reports which degrade the citizen and by assertions that the citizen is guilty?

Question No. 4

Was the Petitioner's right to a fair and impartial trial violated by the denial of Motions for Continuance and Change of Venue, where the Unit-

ed States Senate, knowing of pending criminal proceedings against the Petitioner, caused inflamatory and prejudicial statements against Petitioner to be widely and intensively disseminated in the press and in national magazines, and through the media of radio and television, particularly in the District in which the trial was held, commencing prior to the indictment of Petitioner and continuing until the date of trial?

Question No. 5

Where it was charged that Petitioner did willfully and knowingly aid and assist in, and counsel, procure and advise the preparation and presentation of false form 990 returns, was it a denial of due process to submit the case to the jury and affirm conviction, where there was no evidence that Petitioner saw or signed the returns or knew of their preparation and existence, and no evidence that he performed any act whatsoever in connection with the procurement, preparation or presentation of the returns?

Question No. 6

In a trial which continued for approximately three months, in which Petitioner was charged with four counts of tax evasion and two counts of procuring and making false 990 returns, and where approximately 95 per cent of the evidence related to conduct of Petitioner which was submitted to the jury on the theory that it consisted of acts of embezzlement and other misconduct and where it was subsequently determined by decision of this Court that a conviction for tax evasion based upon embezzlement may not stand, resulting in a new trial

on the tax evasion counts in this case, was it error and a denial of Petitioner's rights under the Fifth and Sixth Amendments to the Constitution of the United States for the Court of Appeals to grant a new trial on the false return counts but deny a new trial on the 990 counts, without consideration of whether the evidence of embezzlement and other misconduct may have prejudiced the jury in its deliberations on the 990 counts?

II. Applicable Constitutional Provisions and Statutes

The Fifth Amendment to the Constitution of the United States provides in part:

> . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . .

The Sixth Amendment to the Constitution of the United States provides in part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . .

26 U.S.C. § 145 provides:

> (b) *Failure to Collect and Pay over Tax, or Attempt to Defeat Tax.* — Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of

a felony and, upon conviction thereof, be fined not more than $10,000 or imprisoned for not more than five years, or both, together with the costs of prosecution.

26 U.S.C. 3793(b) provides:

(b) *Fraudulent Returns, Affidavits, and Claims.*—

(1) *Assistance in preparation or presentation* - Any person who willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a false or fraudulent return, affidavit, claim, or document, shall (whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document) be guilty of a felony, and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

28 U.S.C. § 1863(b) (62 Stat. 952) provides:

(b) Any class or group of persons may, for the public interest, be excluded from the jury panel or excused from service as jurors by order of the district judge based on a finding that such jury service would entail undue hardship, extreme inconvenience or serious obstruction or delay in fair and impartial administration of justice.

28 U.S.C. § 1865(a) (62 Stat. 952) provides:

(a) Grand and petit jurors shall from time to time be selected from such parts of the district as the court directs so as to be most favorable to an impartial trial, and not to incur unnecessary expense or unduly burden the service. To this end the court may direct the citizens of any part of the district with jury

maintenance of separate jury boxes for some or all of the places for holding court in the district and may appoint a jury commissioner for each such place.

II. STATEMENT OF THE CASE

A detailed chronology of the events upon which this Petition is based is set forth in the Appendix to this Petition. This chronology includes the dates of the significant proceedings in the District Court and the proceedings of a Committee of the United States Senate. Illustrative excerpts from the Committee proceedings and news comments which accompanied and resulted from the proceedings are also set forth therein.

This is a case in which it is contended that publicity hostile to petitioner, and which would have been inadmissible upon trial, together with subconscious influences arising from such publicity, infected the entire proceedings, from the grand jury investigation to and including the trial.

The case differs from other cases involving publicity which have been considered by this Court. In this case the denunciations and accusations of Petitioner were not by accident nor, contrary to the statement by the Court of Appeals, were these public accusations the result of petitioner's own acts. 298 F.2d 622, 627. The hostile publicity was created and disseminated by the acts of a Committee of the United States Senate. This was done by the Committee with knowledge of the fact that criminal proceedings were pending against petitioner and with notice of the danger that the Committee proceedings would affect the judicial proceedings. Excerpts from the Committee proceed-

ings (which are reproduced in the Appendix) persuasively impel the conclusion that the Committee conducted its proceedings with the purpose of affecting the judicial proceedings.

On February 26, 1957 a United States Senate Committee (designated as the SELECT COMMITTEE ON IMPROPER ACTIVITIES IN THE LABOR OR MANAGEMENT FIELD)[1] commenced to hold public hearings concerning alleged activities by officials of the International Brotherhood of Teamsters including particularly the petitioner herein. R. 19. On March 25 and 26, 1957, petitioner was required to appear as a witness before this Committee. R. 28. At the outset of his appearance before the Committee petitioner promptly notified the Committee that he would be required to assert the privilege guaranteed to him by the Fifth Amendment because he was then under investigation for alleged violations of federal laws and because the proceedings were being disseminated throughout the country (including the District in which petitioner was subsequently tried) by all news media, including radio, television and press. R. 28. Nevertheless the Committee propounded repeated questions to petitioner which, upon advice of his counsel, he refused to answer, asserting his privilege under the Fifth Amendment. R. 29. During these interrogations members of the Committee repeatedly criticized petitioner for asserting the privilege against self-incrimination, challenged his right to do so and declared, expressly and impliedly, that he would not have done so had he not been guilty of

[1] The proceedings of this Committee have been published by the United States Government Printing Office. The term "Hearings", with appropriate page references, is used herein to designate these printed proceedings.

some crime. R.20-22; and see excerpts from Committee hearings set forth in Appendix A.

Subsequently, on May 8, 1957 petitioner was required to appear a second time before the Committee. R. 30. On this occasion, petitioner's counsel notified the Committee that an indictment against petitioner had already been returned by a grand jury in Tacoma, Washington. R. 30. The Committee was requested to defer further interrogation of petitioner pending disposition of the indictment. Petitioner's counsel stated that, if the Committee insisted on interrogating petitioner it would be necessary for petitioner to again assert the privilege against self-incrimination. R. 31. The Committee refused the request to defer the interrogations and again propounded questions to petitioner to which he was required to assert the privilege against self-incrimination. R. 35-40. During the proceedings which took place on this date, the Committee publicly announced on television and radio, and released to the press, a compilation of fifty-two items of misappropriation of funds and other misconduct alleged to have been committed by petitioner. Other charges, including charges of theft of hundreds of thousands of dollars, were repeatedly made during the various sessions of the Committee and in press releases and were similarly reported by all news media. R. 71, 77; and see excerpts from Committee proceedings set forth in Appendix A.

The Committee caused all of its proceedings to be publicized by all methods of news communication as well as by means of commentaries in leading magazines with nation-wide circulation. R. 21-22; and see illustrative excerpts set forth in Appendix A. The appearance of petitioner before the Commit-

tee, including his repeated assertions of the Fifth Amendment and the denunciatory comments of the Committee with respect thereto, were telecast and broadcast "live" and by film on both local and national news programs. R. 29, 48, 63, 71, 55-56, 73-78. These broadcasts and telecasts included the proceedings in which petitioner was charged with theft and misappropriation. R. 57, 68, 74. One of the telecasts consisted of the popular "Meet the Press" program during which the Chief Counsel of the Committee stated that petitioner had stolen several hundreds of thousands of dollars from the Teamsters Union. R. 61.

All of the television and radio broadcasts reached audiences in the District from which the grand jurors and trial jurors were selected. R. 50, 63, 72. Expert newscasters testified, in pretrial proceedings, that these accusations reached an unusually large proportion of the radio and television audiences. R. 52-61, 63-69, 78.

The newspapers which carried flamboyant headlines of the denunciations and accusations of the Senate Committee had wide circulation throughout the area from which the grand jurors and trial jurors were drawn. R. 27; and see excerpts in the Appendix A. In addition to the normal circulation, the large-type headlines came to the attention of the public by being displayed prominently on news stands so that the public could read the headlines. R. 27-28.

Both of the indictments in the case were returned in the summer of 1957, at the height of the clamor and furor of public denunciation of petitioner. R. 3, 435. No instruction was given to the grand jurors to disregard the reports of the Senate pro-

ceedings and no inquiry was made to determine the effect of the proceedings upon the attitude of any of the grand jurors. R. 42-43. It is believed that the first indictment, returned on May 2, 1957, involving a complicated charge of tax evasion as well as a 990 count, was returned upon evidence which was submitted at a session which lasted less than one court day. R. 30.

While the Senate proceedings were in progress, the State of Washington commenced criminal proceedings against petitioner for embezzlement of $1900.00. The Senate Committee provided substantial assistance to the State prosecuting authorities in the conduct of this prosecution and the Chief Counsel of the Senate Committee subsequently declared that the conviction of petitioner on the embezzlement charge was a "direct result" of the proceedings of the Senate Committee. R. 22-24, 253.

In the empanelment of the State grand jury, specific reference was made to "testimony" before the Senate Committee to the effect that officers of the Teamsters Union had embezzled hundreds of thousands of dollars of the funds of the Union. R. 24.

The State proceeding against petitioner which were the "direct result" of the Senate proceedings added to the mass of hostile publicity. Petitioner's conviction, in December of 1957; was announced in large headlines as, for example: DAVE BECK GUILTY AS THIEF. Further publicity resulted in February of 1958 upon the sentencing of petitioner to a maximum prison term of fifteen years. These proceedings, like the Senate proceedings, were broadcast, telecast, and reported prominently

in the press. (See illustrative excerpts set forth in Appendix A, p. 28A).

The Senate Committee continued its work in 1958, resulting in continued adverse publicity against petitioner. In March, 1958 the Committee published and circulated two interim reports repeating numerous charges against petitioner, including the accusation that he had embezzled hundreds of thousands of dollars from the Teamsters Union.

Similar publicity continued through the summer and fall of 1958. In the issues of the *Saturday Evening Post* for May 3, 1958 and May 10, 1958, Senator John McClellan, the Chairman of the Senate Committee, published an article viciously attacking petitioner. Some excerpts from the article are set forth at Appendix A, pp. 29A-31A. The following brief quotation illustrates the general tenor of the article:

> "[Petitioner] oppressed and cheated the working members. He plundered their funds on a grand scale by many slick devices . . . But he still clings to his misbegotten wealth."

Hearings of the Committee relating to the Teamsters Union and petitioner's successor as president of the Union continued through the summer and into the fall of 1958 with continuing sensational news coverage. Many of these proceedings involved accusations of corruption, violence, and terror. Reports of conduct of this nature were attributed to petitioner because of his close identification with the Teamsters Union in the State of Washington. R. 248.

Further public attention was focused upon petitioner by the campaign for and against the Wash-

ington State "Right to Work" initiative. During this campaign numerous campaign materials based upon the Senate Hearings were circulated in the press. R. 352.

The adverse publicity relating to petitioner during the months of September, October and November (the trial commenced on November 10, 1958) included the following:

Article in September, 1958 issue of *Readers Digest*:

"WHAT UNION MEMBERS HAVE BEEN WRITING SENATOR McCLELLAN"

"BECK WON'T LEAVE FANCY BIG SEATTLE HOME VERY SOON"

Daily Olympian, September 9, 1958.

From the "Letters to the Editor" column: caption at the top is "The Old Refrain" and letter reads:

"To the Editor:

"If it is possible, I would like to have in print the full 'refrain' or excuse Dave Beck, the teamster, used in refusing to answer questions. Over and over again the same answer. And how many times did he do this?

(signed) A. T. Frivold
1608 So. "M"

"Editor's note:

"Mr. Beck said, 'I must decline to answer the question, because this committee lacks jurisdiction or authority under articles I, II, and III of the Constitution; further I decline to answer because I refuse to give testimony against myself and invoke the fourth and fifth amend-

ments; and further because the question is not relevant or pertinent to the investigation.' "

Tacoma News-Tribune, September 14, 1958.

"U. S. AIDE LASHES BECK ON TRIAL STAND"

Seattle Post-Intelligencer
October 2, 1958

Article in October 10, 1958 issue of *U. S. News & World Report* entitled:

"CAN THE LABOR RACKETEER BE STOPPED?"

includes an interview with Senator McClellan and contains the following statement:

> " 'After nearly two years of investigation, Senator McClellan reports many abuses in handling of union money; many cases of violence, including murder; some giant unions controlled by cliques of gangsters through voting 'gimmicks' "

Photograph of petitioner's home, described as "the notorious home of Dave Beck in Seattle," over large caption

"OVER $300,000 IN UNION DUES WENT INTO THIS HOUSE!"

Seattle Times
Seattle Post-Intelligencer
Centralia-Chehalis Daily Chronicle
Olympia Daily Olympian
October 20, 1958 (R. 355)

Reproduction of following headlines:

"UNION DUES AND ASSESSMENTS 'PAID' FOR THESE HEADLINES"

"BECK'S ARREST ORDERED ON TAX CHARGES"

"DAVE BECK IS CONVICTED: TEAMSTER CHIEF GUILTY OF THEFT"

"BECK PROFIT IN TRUST FUND OF WIDOW TOLD"

Tacoma News-Tribune
Vancouver Columbian
Olympian Daily Olympian
Centralia-Chehalis Daily Chronicle
October 23, 1958 (R. 355-356).

Purported letter from union member stating:

"My reason for supporting 202 is that like millions of others I am thoroughly sick of the Becks, the Hoffas and all other union bosses who use their power for their own personal gain."

Seattle Post-Intelligencer
Vancouver Columbian
Olympia Daily Olympian
October 27, 1958

Statement in large campaign advertisement that "Union bosses" have stolen $10,000,000 in members' dues.

Seattle Post-Intelligencer, November 3, 1958

Campaign advertisement on behalf of Republican candidate for U. S. Senate, stating that the candidate "has actually indicted racketeer labor

bosses!" and that he "wears no Dave Beck collar, or any man's yoke!"

Seattle Post-Intelligencer, November 3, 1958

In the November 1958 issue of *The Atlantic* there was a summary of the proceedings of the Senate Committee containing further repetition of the accusations and denunciations of the Committee. In this article, published just prior to commencement of the trial, it was stated that the Senate Hearings "proved" that petitioner stole from $300,000 to $400,000 of union funds. R. 360-363.

In October 1958 there was published by Simon and Schuster a book entitled "Treasury Agent," by Andrew Tully. The United States Secretary of the Treasury wrote a commendatory foreward to the book. A chapter under the heading "The Cheaters" was devoted to "The Fall of Dave Beck." This chapter again repeated the "findings" of the Senate Committee. R. 330, 336, 340.

Motions for change of venue filed by petitioner were denied. R. 114, 232. Petitioner initially filed motions for brief continuances in the expectation that the Senate Committee would discontinue its activities and that the adverse publicity would abate. When it developed that the publicity was continuing up to and including the very month that the trial commenced, petitioner moved for an indefinite continuance. R. 244. This motion was denied. R. 343.

Thus, on November 10, 1958 the case came to trial, preceded by a prolonged and intensive series of accusations and pronouncements of guilt against petitioner—all stemming directly or indirectly from the Government which had guaranteed to petitioner due process of law, but which had persisted in de-

nouncing and condemning petitioner even after the return of the indictments.

At the outset of the trial, during the *voir dire* examination, all of the jurors were reminded of petitioner's assertion of his privilege against self-incrimination. This occurred when a prospective juror announced that he was biased against petitioner for this reason. (The proceedings are set forth in Appendix A, p. 36A-37A).

III. ARGUMENT

A. *Invalidity of Grand Jury Proceedings*

Petitioner's motions to dismiss on the grounds that the Senate Committee proceedings impaired the function of the grand jury were denied. R. 46, 150, 312.

Basic fairness and impartiality of the tribunal is the keystone of due process of law under the Fifth Amendment. This fundamental requirement was applied, at common law, to the grand jury stage as well as the trial stage of criminal proceedings. See *Field's Charge*, 30 Fed. Cas. 992, No. 18255 (Cir. Ct. Cal. 1872); 1 *Wharton on Criminal Law* (7th ed. 1974), pp. 355, 366, § 452; *United States v. Wells*, 163 Fed. 313 (D. C. Idaho 1908); *United States v. Kilpatrick*, 16 Fed. 765 (D.C.N.Y. 1883). Under the Constitution, this Court has consistently held that the grand jury must be impartially constituted and conducted. Where that standard is breached, the accused's right to due process of law has been violated and the indictment must be dismissed. *Cassell v. Texas*, 339 U.S. 282; *Hoffman v. United States*, 341 U.S. 479; *State v. Pierre*, 306 U.S. 354; Annotation, 94 L. Ed. 856, 857. The grand jury is thus no

exception to the elemental standard of fairness; its function is "not only to examine into the commission of crimes, but to stand between the prosecutor and the accused." *Hoffman v. United States*, 341 U. S. 479, 485.

In the present case there can be no doubt that the grand jurors, like virtually the entire populace of petitioner's native area, were violently prejudiced against petitioner by the massive hostile publicity engendered by the Congressional Committee. The grand jury proceedings were conducted amid repeated accusations of crimes, and pronouncements of guilt, made against petitioner by the government. Despite this, the district judge made no effort to instruct the jurors to avoid contact with the publicity or even to disregard it. The surrounding circumstances compel the conclusion that the grand jury was infected with prejudice and hostility against petitioner.

The answer of the court below to the foregoing is that "There was no evidence that in fact the grand jury was prejudiced or that any member thereof had been affected by the vast amount of publicity accorded Beck. . . . We rule that a specific showing of prejudice is necessary to make erroneous the action of the trial judge in refusing to dismiss the indictment." 298 F.2d 622, 627.

In so ruling, the court below has placed an impossible burden upon petitioner and any other accused similarly situated. The record makes clear that the Congressional Committee deliberately elected to "expose" petitioner's alleged crimes at a time which coincided with the grand jury sessions, and that the resultant publicity was not only "vast" but hostile in the extreme. Nevertheless, it is, of

course, impossible to make "a specific showing of prejudice" in the sense of presenting evidence that individual jurors were affected by the publicity. The grand jury proceedings were and are secret, no *voir dire* examination was available to the accused, and it has not been possible to question any grand jurors at any time.

The effect of the ruling below is to let stand any conviction when a "specific showing of prejudice" is not made no matter how obvious it may be from the surrounding conditions that prejudice existed, and despite the government's use of its right of secrecy so as to make a direct showing impossible.

Such a ruling is manifestly unjust. The Court of Appeals has ignored the rule established by this Court that no direct showing of partiality is required of the defendant, and a conviction cannot stand, where the circumstances show a substantial danger that the jurors were activated by prejudice, even though the prejudice may have been unconscious or unacknowledged. *Marshall v. United States*, 360 U. S. 310; *Irvin v. Dowd*, 366 U. S. 717.

The opinion below attempts to distinguish this case from those involving exclusion of minority groups from the jury panel on the ground that "The civil rights protected in these cases are bigger than the rights protecting any criminal or criminal class from the unfavorable publicity resulting from their own corrupt or illegal acts." 298 F.2d 622, 627. It is submitted that no citizen's federal constitutional right to a fair and impartial grand jury (*Cassell v. Texas*, 339 U. S. 282) is "bigger" than that of any other citizen. See *Hernandez v. Texas*, 347 U. S. 475, 478, note 3. If the Constitution requires the dismissal of an indictment where prejudice is inferred

from the fact of class exclusion, it must require the same result where prejudice is demonstrated as irrefutably as it is in the present case. Further, the court's holding begs the very issue involved in this and every other due process case by assuming petitioner to be a criminal *ab initio*, and hence condemned to a lesser degree of constitutional protection than is afforded to more respectable defendants. In the face of petitioner's express notification to the Congressional Committee that criminal proceedings were pending against him, and of his futile request that his public appearances as a witness be postponed, it cannot fairly be said that the publicity resulted from his own "corrupt or illegal acts." On the contrary, the public hostility to him resulted from the Committee's conscious election to "expose" him regardless of the impact of their actions upon the judicial proceedings.

It has become a matter of widespread concern that Congressional hearings involving accusations and "evidence" of misconduct operate to deprive the citizen of an impartial judicial hearing. See Mr. Justice Douglas, *The Public Trial and the Free Press*, 46 A.B.A.J. 941; Snee, *The Case Against Televising Congressional Hearings*, 42 Georgetown Law Journal 1; Newman, *Some Facts on Fact Finding by an Investigatory Commission*, 13 Administrative Law Rev. 120, 122. No worse example of this danger has occurred in recent years than the simultaneous attack upon petitioner in 1957-58 by the Senate Committee and the Department of Justice. The public hostility toward petitioner was not the result of the relatively uncontrollable activities of the newspapers, but of the intentional conduct of the Committee, which acted with full foreknowledge of

the results. The denial of impartiality is double repugnant to the Constitution where it is caused by the deliberate activities of an agency of the prosecuting sovereignty. *Delaney v. United States*, 199 F.2d 107 (1 Cir. 1952):

> The issue is thus whether the government, through its legislative branch, may consciously proceed to create an atmosphere of intense public hostility against a citizen who is simultaneously the subject of criminal charges under consideration by a federal grand jury, and may then rely upon the secrecy of the grand jury proceedings to assert that no specific prejudice has been shown. It is submitted that this question is one of basic importance fully justifying the granting of certiorari.

B. *Refusal to Grant Continuance*

Petitioner's motion for continuance, made when it became apparent that the adverse publicity was continuing into November 1958 (R. 244) was denied. R. 343.

The point in this case is that it was the United States itself which generated the hostility toward petitioner and which refused, even after the return of the indictment, to discontinue the activities which created the atmosphere of prejudice against petitioner—even going so far as to write articles for prominent magazines with national circulation.

These facts are strikingly similar to those involved in *Delaney v. United States*, 199 F.2d 107 (1 Cir. 1952), where the court stated:

> "We think that the United States is put to a choice in this matter: If the United States, through its legislative department, acting conscientiously pursuant to its conception of the

public interest, chooses to hold a public hearing inevitably resulting in such damaging publicity prejudicial to a person awaiting trial on a pending indictment, then the United States must accept the consequences that the judicial department, charged with the duty of assuring the defendant a fair trial before an impartial jury, may find it necessary to postpone the trial until by lapse of time the danger of the prejudice may reasonably be thought to have been substantially removed."

An identical result was reached in *United States v. Florio*, 13 F.R.D. 296 (S.D.N.Y. 1952), where the pre-trial publicity had been prompted by the activities of a state "crime commission."

The Federal courts have long condemned the extra-judicial transmission to the public, including the prospective trial jurors, of hostile reports concerning a defendant in a criminal case. Mr. Justice Jackson, concurring in *Shepherd v. Florida*, 341 U.S. 50, 55 (1951) described the practice as "one of the worst menaces to American justice." The menace is greater, and the unfairness more manifest, when the accusations are made and circulated by an agency of the Government or by a person enjoying the prestige of official status. See *Basiliko v. State*, 129 A.2d 375 (Md. 1957).

Jurors cannot realistically be expected to set aside or ignore the effects of a publicity campaign of such unparalleled intensity and duration as that involved here. In such a context, the defendant is not required to show actual prejudice on the part of individual jurors; due process can have practical meaning only where courts recognize the existence of prejudice where it must have been present despite the jurors' assertions to the contrary. *Irvin*

v. Dowd, 366 U. S. 717; *Marshall v. United States*, 360 U. S. 310; *Meyer v. Cadwalader*, 49 Fed. 32 (C.C. Pa 1891); *Griffin v. United States*, 295 Fed. 137 (3 Cir. 1924); concurring opinion of Mr. Justice Jackson is *Krulewitch v. United States*, 336 U. S. 440, 453.

The court below has ruled that petitioner presented "no clear and convincing proof of prejudice existing in the mind of any juror" (298 F.2d 629). No such direct showing is possible in this or any other case; but it is submitted that to attribute impartiality to the petit jurors here is so unrealistic as to deprive that concept of all meaning. The lapse of time between indictment and trial did not serve to provide an atmosphere of impartiality. The interval was filled with continuing attacks upon petitioner, all stemming directly or indirectly from the Senate Committee. Petitioner was forced to trial before a jury of persons who must necessarily have been biased against him—either consciously or unconsciously—by the actions of the Committee and the unremitting publicity they evoked.

We submit that the United States should not be permitted to create prejudice and then assert that prejudice has not been "convincingly" shown, where the circumstances and rules of law prevent direct proof of the point.

C. *Absence of Evidence on 990 Counts*

Petitioner stands convicted under the "Form 990" counts in the fact of a total absence of evidence that he saw, or signed, or was aware of, or performed any act whatever to bring about the preparation or presentation of either the 1950 return or the 1952 return. The verdict of guilty can

only be the result of the jury's prejudice against petitioner arising from the pre-trial attacks upon him by the government and from the prosecution's determined concentration upon proving him guilty of the uncharged crime of embezzlement.

The evidence concerning these two counts is readily summarized. Neither of the "Form 990" returns for the Building Association were signed by petitioner. Pl. Exs. 50 and 51. Both were signed by Frank W. Brewster, the Secretary-Treasurer, and by Donald D. McDonald, the bookkeeper. McDonald testified that he made out the returns unassisted, uninstructed, and entirely on the basis of his own assumptions plus a minimal amount of information from John Lindsay, Jr., the building contractor. Tr. 4417-4418, 4458-4565, 4800. The returns were then left in Brewster's office, signed by him and McDonald, and submitted. Tr. 4591. There was "no evidence of any kind that petitioner, in the words of the indictment, "did willfully and knowingly aid and assist in, and counsel, procure and advise the preparation and presentation" of either return, or in fact that he ever saw or knew of the existence of either of them. The following is the essence of McDonald's testimony concerning petitioner in this regard:

> Q — "I want to specifically ask you, Mr. McDonald, referring to the 990 Forms for the year 1950, to your knowledge, did Mr. Beck have anything to do with preparing it or signing it?
>
> A — "No, sir.
>
> Q — "And referring to the 990 Form that was submitted to the United States for the year 1952, to your knowledge, did Mr. Beck

have anything to do with preparing it or signing it?

A — "No, sir.

Q — "And that not only includes the actual preparation and signing of the 990 return, but it includes the keeping of the books with respect of it, does it not?

A — "That is right."

Tr. 4828

At the most, the evidence taken as a whole raises only a suspicion that petitioner had a possible motive and opportunity (in his capacity as president of the organization) to commit the offenses charged. *But there is literally nothing in the record to suggest that he in fact did so.* The evidence relied upon by the court below in affirming (298 F.2d 622, 634) comes only to this: Since petitioner generally "directed and controlled" the Building Association, and had "detailed knowledge" of its operation, it may be inferred that he directed the preparation of these particular returns, and had knowledge of their contents, *even though the only evidence of record is precisly to the contrary.*

To affirm a conviction upon this basis violates the elemental requirement of due process that the government must present at least *some* evidence that the defendant *committed an act* in violation of the penal statute. *Thompson v. Louisville*, 362 U. S. 199 (1960). No citizen may constitutionally be imprisoned on the basis of mere suspicion or disbelief in his innocence. A case remarkably similar to this (tried before the same district judge) is *United States v. Pechenik*, 236 F.2d 884 (3 Cir. 1956), where the court reversed the conviction of a corporation president charged with attempting to evade the firm's income tax, and stated:

> "The defendant . . . left the books, bookkeeping and preparation of tax returns to the bookkeeper and account. . . . It is suggested by the government that it is incredible that the defendant did not know all along that capital expenditures were improperly treated; hence he knew the corporation tax returns were false. . . . But disbelief does not supply proof that the defendant participated in, directed, or knew the books were kept incorrectly."

Where the evidence in a criminal case is circumstantial — as all of it is here — due process requires that it be such as to exclude every reasonable hypothesis other than guilt. *Brooks v. United States*, 164 F.2d 152 (5 Cir. 1947). The evidence in this case does not begin to approach that standard, or even the rock-bottom requirements of *Thompson v. Louisville*, Supra. Here, the verdict against petitioner on the 990 counts, in the face of direct evidence of his innocence, serves only to further demonstrate that petitioner was forced to trial in an atmosphere of conscious or subconscious prejudice.

The evidence on the 990 counts was complicated by the fact that practically all of the trial was devoted to the admission of evidence on the tax evasion counts. The government introduced this evidence on the theory that the unreported funds had been embezzled, and the jury was doubtless prejudiced by this supposed commission of another crime.

Following the decision in *James v. United States*, 366 U. S. 213, the government submitted a supplemental brief to the Court of Appeals, contending that some or all of the unreported receipts *were not* embezzled, but were unused expense monies, or funds to which petitioner believed himself entitled.

Although the Court of Appeals referred to the receipts as "an amazing series of embezzlements" (298 F.2d 626), it also agreed that the government might have proved, under proper instructions, that the unreported funds were in fact merely compensation for services (295 F.2d 630).

Although the jury verdict, under the instructions, implies a finding of embezzlement, petitioner has never agreed that the funds were in fact embezzled. Accordingly, the government, upon retrial of the evasion counts, will seek to prove that the receipts were taxable compensation.

If there is to be a new trial on the evasion counts, petitioner should *at the very least* be granted a retrial of the 990 counts, so that a jury can consider these charges not in the context of a claimed crime of embezzlement, but in the light of the theory which the government now proposes—i.e., mere failure to report taxable income.

This point was raised and argued in the Court of Appeals, but was not discussed in that court's opinion.

IV. CONCLUSION

It is respectfully submitted that the acts of the Senate Committee impaired the validity of the grand jury proceedings and that the indictments should have been dismissed.

Petitioner's motion for a directed verdict and acquittal on the 990 counts should have been granted.

In the alternative: because of adverse publicity continuing until the month of trial, petitioner's

motion for a continuance should have been granted; and a new trial should now be granted on the 990 counts.

CHARLES S. BURDELL
WILLIAM L. DWYER
Counsel for Petitioner
929 Logan Building
Seattle 1, Washington

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No. 927

In the Supreme Court of the United States

October Term, 1961

DAVID D. BECK, *Petitioner*

vs.

UNITED STATES OF AMERICA

APPENDIX to PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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WILLIAM L. DWYER
Counsel for Petitioner
929 Logan Building
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FRAYN PRINTING COMPANY

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Excerpts from Senate Committee Hearings commence on Page 4A.

Opinion of Court of Appeals follows Page 37A.

APPENDIX "A"

A chronological summary of the significant events relating to the issues raised by this petition is as follows:

February 16, 1957

Senate Committee[1] directed a "request" to Petitioner to attend Committee hearings, to be subsequently scheduled, to explain "misuse of union funds." Hearings, p. 1509-1510.

February 26, 1957

Senate Committee commenced to hold public hearings concerning alleged activities by officials of the International Brotherhood of Teamsters and affiliated organizations. R. 19. The radio and television reports and comments upon the hearings cannot be reproduced but can fairly be described as "saturation coverage," particularly in the Seattle-Tacoma area. The headlines appearing in newspaper and magazine reports and comments are contained in several thousand pages of exhibits which were filed in the District Court. The following reproductions are illustrative of the type of reports and comments which were circulated in the area in which the grand jury proceedings and trial were conducted, but these reproductions represent a very small fraction of the written material which was distributed throughout the area. Exhibits filed in the District Court contain additional material of this nature.

[1] The term "Senate Committee" as used herein refers to the Select Committee on Improper Activities in the Labor or Management Field. The proceedings of the Committee have been published by the United States Government Printing Office. References herein to "Hearings" relate to the printed proceedings of the Committee.

"ORE. OFFICIAL SAYS TEAMSTERS PLOTTED TO CONTROL HIS STATE"
Seattle Post-Intelligencer, March 2, 1957.

"SENATOR McCLELLAN SEES UNION, VICE TIE-UP"
Seattle Post-Intelligencer, March 3, 1957.

"BAD DAYS FOR DAVE BECK"
Life Magazine, March 11, 1957.

March 12, 1957

Report of special agents of the Internal Revenue Service concerning income tax returns of Petitioner, and returns of certain union organizations was submitted to the Office of the Internal Revenue Service in Washington, D. C. Tr. 981, 989. Newspaper headlines continued:

"BREWSTER SAYS UNION MONEY USED TO PAY JOCKEY'S FARE"

"PROBERS ASK FOR BECK'S PERSONAL FILES"
Seattle Post-Intelligencer, March 16, 1957.

"EISENHOWER OPENS TAX FILES TO PROBERS; BECK, BREWSTER RETURNS TO BE EXAMINED"
Seattle Times, March 18, 1957.

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[2] Petitioner had had a long and publicized relationship with the International Brotherhood of Teamsters in the Seattle-Tacoma area, and his name had been continually linked with Frank Brewster, another official of the International Brotherhood of Teamsters. Accordingly, in the Seattle-Tacoma area, references to "The Teamsters" and to "Brewster" were generally associated in the minds of the public with Petitioner. R. 244.

"CALIFORNIA GOV. KNIGHT DENIES TEAMSTER HELP"
Seattle Post-Intelligencer, March 21, 1957.

"BECK REPAID TEAMSTERS $270,000 AFTER TAX INVESTIGATION BEGAN, PROBER TESTIFIES"
Seattle Times, March 22, 1957.

"NO RECORDS FOUND OF ANY LOANS TO UNION BOSS, SENATOR'S AIDE TESTIFIES"
Seattle Times, March 22, 1957.

"$709,420 UNION FUNDS HELD MISUSED"
Seattle Post-Intelligencer, March 23, 1957.

March 25, 1957

Petitioner wrote a letter to the Chairman of the Senate Committee, reading in part as follows (Hearings, p. 1512; R. 169):

> "In view of nationwide newspaper, radio and television accounts of the proceedings before this committee and the testimony in connection therewith, and further in view of proposed criminal actions against me of which I have been advised are arising out of alleged violations and further in view of other asserted or implied violations of Federal and State laws, I intend to assert all privileges as to anything I might say, and I have a determination not to waive or imply the Bill of Rights as to any question which may be propounded to me or to the production of my records. Respectfully submitted."

March 26 *and* 27, 1957

Petitioner was directed by subpoena to testify as a witness before Senate Committee. Hearings, p.

1515. At the outset of his testimony, Petitioner read to the entire Committee his letter of March 25, 1957 in which he referred to widespread newspaper, radio and television accounts of the proceedings and stated that he intended to assert his privilege against self-incrimination because of proposed criminal proceedings against him. Hearings, p. 1512. The Committee, nevertheless, proceeded to propound innumerable questions to Petitioner, practically all of which contained implications that he was guilty of theft and other forms of misconduct. The Committee also challenged his right to assert the privilege against self-incrimination and severely criticized him for doing so; and certain members of the Committee expressly stated that his assertion of this privilege amounted to an admission of guilt. Despite the fact that it became clear to the Committee that Petitioner, upon the advice of his attorney and because of proposed criminal proceedings, would refuse to respond to questions, the Committee continued such interrogation and comments for two full days, and the Chairman of the Committee expressly stated that the purpose of such proceedings was to demonstrate to the public at large the offensive nature of Petitioner's conduct.

The proceedings which occurred during Petitioner's appearance before the Committee were broadcast and telecast "live" and by film throughout the Seattle-Tacoma area, and portions of the proceedings were repeated during evening broadcasts and telecasts. R. 42, 48-78. Significant excerpts from the proceedings of March 25 and 26 are as follows:

Hearings, p. 1509

(Senator McClellan)

"In the course of an investigation regarding

operations of labor unions and their relationship with governmental agencies, conducted by the Senate Government Operations Permanent Subcommittee on Investigations during the latter part of last year and the early part of January of this year and prior to the establishment of this select committee, information was discovered clearly indicating the misuse of union funds by Mr. Beck, International President of the Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. . . ."

Hearings, p. 1510

(Senator McClellan)

"This hearing today was scheduled primarily to allow Mr. Beck to turn over to the committee certain of his personal financial books and records. I think it fair and proper to say that during the past 10 days, evidence was developed before this committee supplemented by additional information that the committee has, that clearly indicates that from the years 1949 through the first 3 months of 1953, Mr. Beck took more than $320,000 from the teamsters union treasury in Seattle. From the information now before this committee that money so taken by Mr. Beck was neither a gift nor a loan to him from the union. . . ."

Hearings, p. 1514

(Senator Ives)

"There is no question in my mind but what the Senate intended us to have this power in setting up this committee. If the Senate has the power the committee has the power, so you are challenging the Senate itself, and you are challenging the Congress itself in the challenge you make. *You are challenging, moreover, the whole Government of the United States.* . . ."
(Emphasis supplied)

Hearings, p. 1519-1520

(Chairman, et al.)

The CHAIRMAN. "Do you know that the position that this right of using the fifth amendment so as to preclude your having to disclose knowledge and information you have about transactions you have had with your union in which evidence has been developed that you have misappropriated and misused funds of that union—do you regard your privileges under the fifth amendment as transending your duty and obligations to the laboringmen (sic) of this country who belong to your union?

Mr. BECK. "I would like to—

(The witness consulted with his counsel.)

Mr. BECK. "I would like to say, at this time in answer to your question—

(The witness consulted with his counsel.)

Mr. BECK. "That—

(The witness consulted with his counsel.)

Mr. BECK. "I would like to answer the question this way: That there are legal rights involved in answering this question and that I very definitely am answering, and in taking advantage of any of the amendments, I am doing so upon the 100 percent unanimous advice of my chief counsel, Senator Duff, and associate counsel identified with him.

The CHAIRMAN. "Well, the Chair certainly would not reflect upon your counsel. We regard them as very able and competent, no doubt.

Mr. BECK. "We agree on one place.

The CHAIRMAN. "No doubt they feel that it would be best for you to take the fifth amendment, if they have so advised.

Mr. BECK. "I am carrying out the advice of Senator Duff, my counsel.

The CHAIRMAN. "But what I want to find out, and I think there are about 1,300,000 or 1,500,000 teamster union members in this coun-

try who would like to know whether you regard the fifth amendment as a protection device to yourself and transcending the duty and obligation that you owe to them and the responsibility that they have honored you with in the highest position of trust you now hold in their union.

Mr. CONDON. "Mr. Chairman, I feel that Mr. Beck has expressed his views on the subject that you have dealt with and I submit that your question is entirely irrelevant to the proceedings.

The CHAIRMAN. "Well, I do not think many people in America will agree with that conclusion. I think that we are entitled to know in this inquiry. When one invokes the fifth amendment, it has always been my position that it is a privilege. But he has no duty to invoke it.

"Some people are in positions of trust and honor and obligation where, in my judgment, the duty and obligation they owe to those who have placed them in that position of trust, certainly transcends the right of invoking the fifth amendment.

"I just want to get his views about it. I want to give him this opportunity to tell his union members and tell the country, the people who are interested in this proceeding, and its objectives, whether he so regards it."

Hearings, p. 1522

(Senator Ervin)

"Mr. Beck, do you not believe that the members of the teamsters are entitled to have as a president, a man who will conduct his affairs as president of such union in such a manner that when he is called upon to account for his handling of union funds, he will not feel compelled either on his own volition or on the ad-

vice of counsel, to hide behind the fifth amendment to keep from giving an accounting?"

Hearings, p. 1523

(Senator Ervin)

"I think that you concur in my inference then, that Senator Duff and your other counsel gave you very wise advice when they told you to invoke the fifth amendment, after they had been informed by you of your transactions of union affairs, is that not so? Do you not think that they gave you wise advice?"

Hearings, p. 1527-28

(Senator McNamara)

" . . . . When you answer these questions or refuse to answer these questions you are not only reflecting on yourself and your organization, but you are also reflecting on approximately 15 million Americans. I think you have a tremendous weight on your shoulders. I want to sympathize with you because of that situation.

"However, this committee is charged by the United States Senate to make a study. Obviously, the ends are twofold: to recommend to the Department of Justice actions where we find illegal acts have been committed; second, and perhaps (sic) the most important duty, is to recommend legislation to correct improper activities in the field of management and labor. . . . "

Hearings, p. 1533

(Mr. Kennedy—Committee Counsel)

"We have information and it has been developed this past week, that Mr. Dave Beck took large sums of money from the teamsters union in Seattle, Wash., and used them for his

own personal benefit. I would like at this time to question Mr. Beck about some of those funds.

The CHAIRMAN. "Counsel may proceed.

Mr. KENNEDY. "During the year 1946, Mr. Dave Beck took $31,000 from the Joint Council Building Association to pay off a loan that he had from a bank.

(The witness conferred with his counsel.)

Mr. KENNEDY. "Mr. Beck, did you do that?

(The witness conferred with his counsel.)

Mr. BECK. "In regards to the allegation, I must decline to answer the question because this committee lacks jurisdiction or authority under articles I, II, and III of the Constitution; further, because my rights and privileges granted by the Constitution as expressed by the fourth and fifth amendments are violated.

The CHAIRMAN. "Do you honestly believe, Mr. Beck, that if you answered that question truthfully, a truthful answer under oath might tend to incriminate you?

Mr. BECK. "It might; and I emphasize 'might.'

The CHAIRMAN. "It really might. . . ."

Hearings, p. 1535

(Mr. Kennedy)

"Mr. Chairman, we have information indicating that from the year 1949 Mr. Dave Beck took from the union funds some $4,812.39 and deposited it in his own bank account.

The CHAIRMAN. "Ask the witness whether he did it.

Mr. KENNEDY. 'Mr. Beck, did you take some $4,812.39 from the Western Conference of Teamsters in the year 1949 and deposit it in your own bank account?

(The witness conferred with his counsel.)

Mr. BECK. "I must decline to answer the question because this committee lacks jurisdic-

tion or authority under articles I, II, and III of the Constitution; further, because my rights and privileges granted by the Constitution as supplemented by the fourth and fifth amendment are violated."

Hearings, p. 1536

(Mr. Kennedy et al.)

Mr. KENNEDY. "Mr. Chairman, we have information that approximately $196,516.49 was taken from union funds in Seattle to pay Mr. John Lindsay for work that was done on Mr. Beck's home and on homes that were on Mr. Beck's property.

The CHAIRMAN. "What is that amount?

Mr. KENNEDY. "$196,516.49 from 1949 through 1953.

"Mr. Chairman, out of that amount, $136,805.65 was taken from Joint Council 28 Building Association; $59,710.84 was taken directly from the Western Conference of Teamsters. Mr. Beck signed all these checks.

The CHAIRMAN. "Mr. Beck, the Chair will ask you whether there was a total of $196,516.49 taken out of union funds to pay for the building of your house and other houses on your property.

(The witness conferred with his counsel.)

Mr. BECK. "I must decline to answer the question, because this committee lacks jurisdiction or authority under articles I, II, and III of the Constitution; further, because under rights and privileges granted by the Constitution as supplemented by the fourth and fifth amendments, I need not answer.

The CHAIRMAN. "You are ordered and directed to answer the question.

Mr. BECK. "My answer is the same as I just read into the record.

The CHAIRMAN. "The order of the Chair will continue.

Mr. KENNEDY. "Mr. Chairman, we have information that from the year 1949 to 1953—

The CHAIRMAN. "Let me ask the witness: Do you want to comment on any of this, this $136,805 and some cents—he got out of what council?

Mr. KENNEDY. "Joint Council 28 Building Association.

The CHAIRMAN. "Would you like to comment on that and clear it up for us?

Mr. BECK. "I have answered the question. I do not desire to change it in the slightest degree.

The CHAIRMAN. "You do not want to comment?

Mr. BECK. "Only as I have answered the question.

The CHAIRMAN. "I see."

Hearings, p. 1537

(Senator McCarthy)

"You know that if you are innocent of any wrongdoing, then you could answer very simply "yes" or "no." It is only if you are guilty of wrongdoing that you might incriminate yourself? You realize that, do you not?"

Hearings, p. 1548

(Senator Mundt)

"As one layman to another, just as in discussing this on television or radio which is comprised primarily of laymen, let me say that I cannot understand why in the world unless there is some reason of guilt on your part you would not answer a simple question about union policy such as I have propounded to you. I was not trying to involve you in any way. I was talking about general officers of the teamsters organization which you head."

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Hearings, p. 1670

(Mr. Kennedy)

Mr. KENNEDY. "Mr. Chairman, we have information that out of the $320,000 that Mr. Beck took from the union, $196,000 of it went to the contractor John Lindsay for working at Mr. Beck's home, including the building of his swimming pool.

"I would like to ask Mr. Beck if that is correct.

Mr. BECK. "I must decline to answer the question because this committee lacks jurisdiction or authority under articles I, II, and III of the Constitution; further I decline to answer because I refuse to give testimony against myself and invoke the fourth and fifth amendments; and further, because the question is not relevant or pertinent to the investigation."

Hearings, p. 1671

(Mr. Kennedy)

Mr. KENNEDY. "Mr. Chairman, on another matter, we have information that Dave Beck purchased 2 lots, 2 properties, that adjoined the Joint Council Building Association in Seattle; that he purchased these lots for $39,000 and then sold them to the teamsters union for $135,000.

The CHAIRMAN. "Let the Chair ask you to clarify it. Was that at a time when he was an official in the union?

Mr. KENNEDY. "That is correct, Mr. Chairman. He purchased the lots for $39,000 and sold them to the teamsters union for $135,000, based on the information that we have.

(The witness conferred with his counsel.)

The CHAIRMAN. "Ask the witness whether he did it.

Mr. KENNEDY. "Mr. Beck, did you do that?

Mr. BECK. "I must decline to answer the question because this committee lacks jurisdiction or authority under articles I, II, and III of the Constitution; further, I decline to answer because I refuse to give testimony against myself and invoke the fourth and fifth amendments; and further, because the question is not relevant or pertinent to the investigation."

Hearings, p. 1677

(Mr. Kennedy)

Mr. KENNEDY. "Mr. Chairman, as I stated, in March 1954 was the interview Mr. Beck had with the Internal Revenue Department. He was then unable to tell exactly how much he had taken from the union. So he sent the $200,000 in in August of 1954 and signed an agreement with the union at that time that the $200,000 would be a down payment on account and that the rest of the money would be repaid at a later day, when they could determine, by tracing Mr. Dave Beck's use of the union funds, how much money he had taken from the union treasury. I want to ask him if that is a correct recitation of the facts.

Mr. BECK. "I must decline to answer the question because this committee lacks jurisdiction or authority—

The CHAIRMAN. "All right. Consider it all read. Insert in into the record at this point."

Hearings, p. 1678

(Senator McClellan)

"The Chair wishes to make this statement. We have a witness here that is refusing to answer, and who is hiding behind the fifth amendment. The only reason I have continued is to let the country know, let the teamsters of this country know, the chara ter of transactions that have transpired, about which this

witness is unwilling to make disclosures under oath. For that reason, I have indulged the interrogation to this point."

At the conclusion of Petitioner's appearance before the Committee, the Chairman of the Committee declared: (*Hearings*, p. 1683-84)

"It had been hoped that when Mr. Beck appeared before this committee he would be a cooperative witness, that he would come in a spirit of trying to assist and aid the committee in performing its functions and rendering the service to the Government that it is his duty to render.

"Unfortunately and unhappily, that has not been the case. It did not materialize in that way. This witness in my opinion has shown utter contempt for this committee, for the Congress of the United States, and for his Government.

"Whether that contempt is actionable or not, I am not at the moment prepared to say, but this committee will give consideration to the question of whether it is actionable.

"If it is found to be, I have no doubt what the judgment and action of the committee will be. Mr. Beck has shown flagrant disregard and disrespect for honest and reputable unionism and for the best interests and welfare of the laboring people of his country.

"Above all, he has shown arrogant contempt for the million and a half members, the honest laboring people in the teamsters union. Since he is so anxious to get into court, it is my sincere hope that in due time the witness will be judged accordingly.

"Now, I regret that proper propriety and common decency dictates that I should not spread here on the record any further substance of my opinion . . ."

The headlines relating to Petitioner's appearance before the Senate Committee were as follows:

"SENATORS CITE BECK OBLIGATION TO PUBLIC TO ANSWER QUESTIONS"
Seattle Times, March 26, 1957.

"UNIONS' $85,819 USED TO PAY BECK BILLS, SAY PROBERS"
Seattle Times, March 26, 1957.

"BECK WON'T BARE RECORDS"
"LABOR BOSS INVOKES 5TH AMENDMENT"
Tacoma News-Tribune, March 26, 1957.

"BECK SOLD HOME TO TEAMSTERS TO PAY UNION LOAN, SAY SOLONS"
"$320,000 TAKEN BY UNION BOSS, PROBERS CHARGE"
Seattle Times, March 27, 1957.

The avid interest of the public in the radio coverage of Petitioner's appearance before the Committee is demonstrated by the following newspaper report:

"BECK INQUIRY JAMS *KING* SWITCHBOARD"

"Many residents of the Northwest, listened Tuesday to radio broadcasts of Teamsters Chief Dave Beck sparring with a Senate committee.

"KING officials said the response to the station's live broadcast of the hearing was 'astounding.' Station KVI also carried portions of the hearing live.

"One KING official said the station's switchboard was swamped with thousands of calls, more than for any other broadcast."

Seattle Post-Intelligencer, March 27, 1957.

The reputed attitude of the President of the United States toward these proceedings was indicated by the following headline:

"BECK'S REFUSAL TO REPLY LOOKS BAD, IKE FEELS"
Tacoma News-Tribune, March 27, 1957.

The newspaper reports continued:

"BECK TAKES 5TH AMENDMENT"
Seattle Times, March 26, 1957.

"BECK WON'T ANSWER QUESTIONS ON FUNDS"
Seattle Post-Intelligencer, March 27, 1957.

Radio KING 1090

"LIVE" TODAY, WED.

7 a.m. to approximately 9:30 a.m.
11 a.m. to approximately 2:15 p.m.
7 p.m. to 10 p.m., taped highlights of today's hearings.

EXCLUSIVE

DAVE

BECK

FILM HIGHLIGHTS OF WEDNESDAY'S HEARINGS
10:30 to 11:00 p.m., Hearing Highlights
11:00 to 11:15 p.m., World Today News with Ted Bryant.
11:15 to 11:45 p.m., Hearing Highlights.

KING-TV CHANNEL 5

Beck Inquiry Jams KING Switchboard

Many residents of the North west, listened Tuesday to radio broadcasts of Teamsters Chief Dave Beck sparring with a Senate committee.

KING officials said the response to the station's live broadcast of the hearing was "astounding." Station KVI also carried portions of the hearing live.

One KING official said the station's switchboard was swamped with thousands of calls, more than for any other broadcast.

KING radio will carry the Wednesday hearing live from 7 to 9:30 a. m. and from 11 a. m. to about 2:15 p. m. KVI will broadcast the session from 1 to 2:30 p. m.

Wednesday Radio

KVI	KIRO		KING	KOMO
E. Hemingway	News	7:00	Senate	Newscast
Breakfast Gang	Cliff & Clark	7:15	" Hearings	" Continued
Back to	News	7:30	" (Live)	" R. Nichols
" the Bible	Cliff & Clark	7:45	" Continued	H. Shuman
Cliff Engle	" Continued	8:00	" Continued	Dial 1000
Wthr. Sports	NW Headline	8:15	" Continued	" M. Ireland
Reporter	Dave Valle	8:30	" Continued	" Hal Moan
Cecil Brown	R. Miller	8:45	" Continued	" Continued
News	W. Warren	9:00	" Continued	" News
Ladies Jrnl.	Bridge Wife	9:15	" Continued	" Continued
Unity Viewpt.	Helen Trent	9:30	Breakfast	" Continued
Hllywd. Mayle	News	9:45	" Continued	K. Wise
Newsp. of Air	Nora Drake	10:00	Eliz. Leonard	Bandstand
Tello Test	MaPerkins	10:15	O. Anderson	" Continued
Morn. Melodies	Dr. Malone	10:30	Girl Marries	" Continued
M. Considine	Our Gal Sun.	10:45	Whisprg. Sts.	" Continued
News	Rizzo Hapes	11:00	Senate	" Continued
Music	Mrs. Burton	11:15	" Continued	" Continued
Queen for	Strike Rich	11:30	" Continued	" Continued
" a Day	Pat Buttram	11:45	" Continued	" Continued
Noon News	Noon News	12:00	" Continued	M. Ireland
Harmony	Solly Garden	12:15	" Continued	Farm News
" Hoedown	Houseparty	12:30	" Continued	Lunch With
" Continued	" Continued	12:45	" Continued	" K. Wise
" Continued	Arthur	1:00	" Continued	Bill Goodwin
" Continued	" Godfrey	1:15	" Continued	" Show
Carnival	" Continued	1:30	" Continued	" Continued
" Continued	" Continued	1:45	" Continued	" Continued
" Continued	" Continued	2:00	" Continued	True Con-
" Continued	" Continued	2:15	Open House	" fessions
" Continued	Housewives	2:30	" French	Wom. in Hs.
" Continued	Road of Life	2:45	" Continued	Dr. Gentry
Popular	Ruth Ashton	3:00	Musiking	Five-Star
" Parade	Percy Faith	3:15	" w/Warren	" Matinee
Behind Story	Song Times	3:30	" Saunders	Hilltop Hse.
Here's Answer	Hwse. Prot.	3:45	" Continued	P. Young
Fulton Lewis	" League	4:00	" Continued	Dial 1000
E. Hemingway	Headin'	4:15	" Continued	" with Bob
Tello Test	" Home Club	4:30	" Continued	" Ackerley
Sam Hayes	" Continued	4:45	" Continued	" Continued
Bob and Ray	Ed. Morrow	5:00	Musiking	Alex Dreier
" Continued	Northwest	5:15	" Continued	News
" Continued	" News	5:30	" Continued	Sprts., Fishg.
N. W. News	Frank Goss	5:45	" Continued	E. Peterson
Dinner Music	Tom Harmon	6:00	Hdline. Nws.	Spotlite Rev.
" Continued	L. Thomas	6:15	Mel Allen	Alex Dreier
Virgil Pinkley	Amos 'n'	6:30	Edw. Morgan	Big Sound
Sam Hayes	" Andy	6:45	News	" Continued
Gabriel Heater	Clifford &	7:00	Senate	Listening
Bill Brundige	" Clark	7:15	" Hearings	Negro Press
Music	Robert Q.	7:30	" Recordings	Acad. Award
" Treasures	" Lewis	7:45	" of the	" Continued
" Continued	Labor	8:00	" Hearings	" Continued
" Continued	" Hearing	8:15	" of the	" Continued
Family	World	8:30	" Day	" Continued
" Theater	" Tonight	8:45	" Continued	" Continued
News Final	Opinion Pls.	9:00	" Continued	" Continued
Fulton Lewis	" Continued	9:15	" Continued	Music
Music by Roth	Back to the	9:30	" Continued	What's New
" Continued	" Bible	9:45	" Continued	" In Books
Chuckwagon	World Final	10:00	" Continued	Reporter
" Jamboree	Brigadier Rm.	10:15	" Continued	Weather
World	Music Hall	10:30	" Continued	Viewpoint
" Tomorrow	" Continued	10:45	" Continued	" Continued
Ranch House	" Continued	11:00	" Continued	News
" Roundup	Dave Page	11:15	" Continued	Album of
Silent	" Continued	11:30	" Continued	" Classics
Silent	" Continued	11:45	" Continued	" Continued
Silent	Silent	12:00	Nite Owl Club	Silent 12:15

"PROBERS LET BECK GO WITH STINGING REBUKE"

UNION CHIEF STAYS SILENT"

Seattle Post-Intelligencer, March 28, 1957.

"THE MYSTERY OF THE MISSING $320,000"

"DAVE BECK TAKES THE 'FIFTH,' BUT THE STORY GOES INTO THE RECORD"

U. S. News & World Report, April 5, 1957.

"TEAMSTER BOARD TO HOLD SECRET STRATEGY MEETING"

Tacoma News-Tribune, April 11, 1957.

"HOW DAVE BECK RATES NOW IN HIS HOME TOWN"

"Take a look around Seattle these days and you find what a Senate inquiry can do to a top labor leader in his own home town . . . "

U. S. News & World Report, April 12, 1957.

April 25, 1957

Prompted by the Senate Committee proceedings, the judges of the Superior Court of King County, Washington directed that a grand jury be convened to investigate Petitioner. In selecting and impanelling the grand jury, the Court declared:

> "We come now to the purpose of this grand jury . . . .
>
> "It seems unnecessary to review the recent testimony before a Senate Investigating Committee except to say that disclosures have been made indicating that officers of the Teamsters Union have, through trick and device, embezzled or stole hundreds of thousands of dollars of the funds of that union. . . ." R. 23-24.

The press reported the State Grand Jury proceedings as follows:

"JUDGES ORDER COUNTY GRAND JURY!"
"CARROLL TO DIRECT INVESTIGATION OF TEAMSTERS"
Seattle Times, April 25, 1957.

"FUR TO FLY IN SEATTLE'S BECK PROBE"
Tacoma News-Tribune, April 27, 1957.

In addition to the continuing radio and television reports and comments, the newspaper headlines continued:

"McCLELLAN WARNS OF U. S. 'GANGSTER ECONOMY'"
Tacoma News-Tribune, April 26, 1957.

"BECK WITNESSES DISAPPEAR"
"TEAMSTER CHIEFTAIN'S SON AMONG QUARTET SOUGHT; SAY SENATE RACKET PROBERS"
Tacoma News-Tribune, April 28, 1957.

May 2, 1957

The first indictment involved in this case was returned by a grand jury, sitting at Tacoma, Washington. This indictment included a tax evasion count and a 990 count, each relating to the year 1950. R. 3.

The grand jury which returned this indictment, and the subsequent indictment involved in this case, had been given no instructions or directions to avoid exposure to or influence by the publicity generated by the Senate Committee; and no grand

juror had been excused for bias or prejudice resulting from exposure to the Committee proceedings. R. 42-43.

Along with the continuing radio and television publicity, the newspaper reports continued as follows:

"DAVE BECK INDICTED!"
"U. S. GRAND JURY IN TACOMA CHARGES $56,000 EVASION OF INCOME TAXES"
"PROBE CONVENED SECRETLY BY JUDGE BOLDT"
Seattle Times, May 2, 1957.

"BECK'S ARREST DUE TODAY IN U. S. TAX EVASION CASE"
Seattle Post-Intelligencer, May 3, 1957.

"BECK YIELDS, POSTS $5,000 BAIL"
Tacoma News-Tribune, May 3, 1957.

"BUSY WEEK AHEAD FOR BECK MUST FACE AFL-CIO AND SOLONS"
Tacoma News-Tribune, May 5, 1957.

"TEAMSTERS FAILED TO CLEAN UP CORRUPTION, CHARGES AFL-CIO"
Tacoma News-Tribune, May 7, 1957.

"SENATE PROBE LIFTS LID ON BECK BEER BUSINESS"
"USE OF UNION MONEY RELATED"
Seattle Post-Intelligencer, May 9, 1957.

"BECK SHARED $11,000 PROFIT AS TRUSTEE FOR WIDOW OF TEAMSTER, SAYS WITNESS"
Seattle Times, May 11, 1957.

"LABOR"
"AND NOW, TAXES" Showing photograph of Petitioner with caption:

"TEAMSTER BOSS BECK"
"TWO COUNTS AGAINST PUDGY PRIDE"
Time Magazine, May 13, 1957.

"BECK: TROUBLES JUST BEGINNING"
Newsweek, May 13, 1957.

May 15, 1957

On this date Petitioner was again required to appear before the Committee. These proceedings were also the subject of "live" broadcasts and telecasts. R. 110. At the outset of proceedings on this occasion, his attorney, Mr. Edward Bennett Williams, addressed the Committee as follows (Hearings, p. 2038-39):

> "On May 2 of this year, this witness was indicted by a Federal grand jury, sitting in the western district of Washington, for income-tax evasion. That indictment is now pending at this moment, and trial date has not yet been set, but an early trial is expected.
>
> "I have canvassed the situation very carefully in the last few days since Mr. Beck retained me, and I want to call to the attention of the committee that it is my belief and conviction that never before has a witness been called before a congressional committee who has been under indictment and interrogated about matters which can be possibly germane to the indictment.
>
> * * *
>
> "Now, in the light of that fact, Mr. Chairman, I am going to formally request that the

appearance of this witness be deferred until such time as that tax case is adjudicated, because he finds himself at this moment spiked on the horns of a dilemma.

"If he answers questions about financial transactions, he is, in effect giving the Government a pretrial discovery deposition before his trial. He is giving them the benefit of all of the evidence that may be relevant to his defense.

"On the other hand, if he seeks refuge in the fifth amendment, under recent decisions, that fact can be shown against him when and if he takes the stand in his tax case in Washington.

"Now, I think that I should call this to the attention of the committee at the very outset. I think the Government must make an educated choice here. It must decide whether the tax case is more important or whether this hearing of this witness is important.

"Because, under the decisions, especially in the Delaney case in the first circuit, where there was a comparable situation, the first circuit court of appeals reversed the conviction against Delaney and held that the Government could not at once proceed in the judicial system by indictment and at the same time hold open hearings on matters relevant to the indictment.

"In the Delaney case, I hasten to call your attention to the fact, Mr. Chairman, Delaney was not called before the King committee, but witnesses were called after his indictment concerning financial transactions.

"I say these things so that the committee will understand the position we are taking, because I think candor requires me to say that I propose to recommend to counsel who handles the tax case in the Federal district court in Washington that full exploitation be made of the defendant's rights under the Delaney decision.

"Secondly, I must say to you, Mr. Chairman, that if you do not defer this hearing that I must advise this witness to refuse to answer any questions, on the basis of the fifth amendment, which I deem to be relevant in any way to the matter pending in the Federal district court in Washington.

"My formal request, Mr. Chairman, is that you defer his appearance until such time as his tax matter is adjudicated."

Following the above statement of Mr. Williams, the Hearings proceeded as follows (Hearings, p. 2379):

The CHAIRMAN. "All right. The Chair wishes to make this statement: The staff has made a compilation here of the instances in which Mr. Beck may have misused his authority and position as president of the Western Conference of Teamsters, a position of trust, and subsequently as president of the International Brotherhood of Teamsters.

"I am going to ask counsel of the committee to read to Mr. Beck these items, one by one. We will give him an opportunity to answer or to make any comment that he desires.

"Counsel, of course, can advise his client if any of the questions he thinks, under the circumstances, require advice that he take the fifth amendment. He has a right to do that."

The compilation referred to in the above statement consisted of 52 items of alleged misappropriations of funds and other misconduct on the part of the Petitioner. This list of items was, of course, distributed to the press.

Petitioner was then further interrogated and, upon advice of Mr. Williams, asserted the privilege against self-incrimination.

Following this second appearance before the Committee, illustrative newspaper headlines were as follows:

"BECK ACCUSED OF 52 MISUSES OF POSITION"

Seattle Times, May 16, 1957.

"McCLELLAN BLASTS BECK FOR 'RASCALITY,' 5TH INVOKED 60 TIMES"

Seattle Post-Intelligencer, May 17, 1957.

"SENATORS VS. DAVE BECK: WHAT ROUND 2 BROUGHT OUT"

"Mr. Beck, indicted May 2 on a charge of income tax evasion, appeared before the Committee for the second time—and pleaded the Fifth Amendment to most questions."

U. S. News & World Report, May 17, 1957.

" 'BECKVILLE' TAKES IN LOTS OF TERRITORY"

Tacoma News-Tribune, May 18, 1957.

"LABOR RACKETS: DOOMED?"

(Article begins)

"Is Dave Beck Doomed? . . ."

Newsweek, May 20, 1957.

"INVESTIGATIONS: HIS MAJESTY THE WHEEL"

"Untangling the knotted skein of corruption that spewed from the power wheel of Teamster Boss Dave Beck, the Select Senate Committee . . ."

Time Magazine, May 20, 1957.

"McCLELLAN 'LAYS' MANY CRIMINAL ACTS TO BECK"
Seattle Post-Intelligencer, May 21, 1957.

"OFFICIAL TRANSCRIPT—THE CASE AGAINST DAVE BECK AS SENATORS SEE IT"
U. S. News & World Report, May 24, 1957.

"BECK JR. TAKES 5TH 130 TIMES; BECK SR. ARRAIGNED IN TAX CASE"
Seattle Post-Intelligencer, June 5, 1957.

"DAVE BECK JR. TAKES 5TH: FATHER PLEADS INNOCENT"
Seattle Post-Intelligencer, June 5, 1957.

"DENIES PLEA FOR TRIP TO EUROPE BOLDT RULES BECK CAN'T LEAVE U. S."
Tacoma News-Tribune, June 7, 1957.

"TEAMSTERS TOLD TO OUST BECK— OR ELSE"
Seattle Post-Intelligencer, June 8, 1957.

Cover on the *Saturday Evening Post*, lead article is listed on the cover as:
"THE UNKNOWN SLEUTH WHO TRAPPED DAVE BECK"
Saturday Evening Post, July 6, 1957.

(This article was written by Carmen Bellino who, at the time of publication of the article, was still employed as an accountant-investigator for the Senate Committee.)

"COURT REFUSES TO PERMIT DAVE BECK TO LEAVE U. S."
Seattle Post-Intelligencer, July 8, 1957.

July 12, 1957

On this date the grand jury which had been impanelled in King County, Washington, returned an indictment against Petitioner and his son. Petitioner was charged with embezzling the sum of $1900. R. 23-24.

Radio and television reports continued, of course, as did the newspaper headlines:

"JURY INDICTS DAVE BECK ON GRAND-LARCENY CHARGE"
Seattle Times, July 12, 1957.

"DEFRAUDED UNION, SAYS ACCUSATION"
"CHARGED WITH SELLING CAR OWNED BY UNION FOR $1900 AND POCKETING PROCEEDS"
Tacoma News-Tribune, July 12, 1957.

"GRAND JURY INDICTS BOTH BECKS ON GRAND LARCENY CHARGES"
Seattle Post-Intelligencer, July 13, 1957.

July 22, 1957

On or about this date the federal grand jury sitting in Tacoma resumed its deliberations. The jurors had been permitted to read the newspapers and observe television reports and comments, and were permitted to continue doing so. R. 42-43.

"GRAND JURY PLANS ANOTHER STUDY OF BECK'S TAX RETURNS"
Olympia News, July 22, 1957.

"JURY TO SCAN BECK RETURNS"
Tacoma News-Tribune, July 22, 1957.

"BECK TAX PROBE START IS EXPECTED"
"GRAND JURY BEGINS TOMORROW AT
FEDERAL DISTRICT COURT
HERE TOMORROW"
Tacoma News-Tribune, July 28, 1957.

"THE BUSY DESCENT OF DAVE BECK"
Featured article in
Look Magazine, August 6, 1957.

"2 TOP TAX MEN HERE FOR PROBE"
"JUSTICE DEPT. PAIR IN CONFERENCE
WITH LOCAL U. S. ATTORNEYS
IN BECK INQUIRY"
Tacoma News-Tribune, August 16, 1957.

"CAN LABOR LIVE DOWN DAVE BECK?"
Article, *Saturday Evening Post*, August 24, 1957.

August 28, 1957

On this date the second indictment against Petitioner was returned by the grand jury. R. 435.

The headlines continued:

"BECK, SON INDICTED ON TAX CHARGES"
Seattle Post-Intelligencer, August 29, 1957.

"BECK DENIED GRAND JURY RECORD"
"NO ESCAPE FOR HOFFA"

"It's impossible to believe that James R. Hoffa will be seated and long remain as president of the Teamsters Union.

"All the forces of morality, honesty, decency and honor oppose him. They destroyed Dave Beck and they have already started to crush Hoffa."

Editorial,
Tacoma News-Tribune, October 25, 1957

December 2, 1957

On this date the trial of Petitioner in the State Court for embezzlement of $1900.00 was commenced. The newspaper headlines announced:

"DAVE BECK'S GRAND LARCENY TRIAL OPENS"
Tacoma News-Tribune, December 2, 1957.

"DAVE BECK TOP STORY OF 1957 IN WASHINGTON"
Tacoma News-Tribune, December 27, 1957.

"DAVE BECK TOP NEWS STORY OF STATE DURING 1957"
Seattle Post-Intelligencer, December 29, 1957.

February 20, 1958

On this date petitioner, having been convicted of embezzlement of $1900.00, was sentenced to imprisonment.

The newspaper publicity reported:

"BECK SENTENCED TO PRISON"
Seattle Post-Intelligencer, February 21, 1958.

"BECK DRAWS 15-YEAR SENTENCE"
Tacoma News-Tribune, February 21, 1958.

"PROBERS RAP HOFFA, BECK"
Tacoma News-Tribune, March 25, 1958.

"FIVE UNION LEADERS CHARGED WITH MISUSE OF $10 MILLION"
Seattle Post-Intelligencer, March 25, 1958.

"DAVE BECK, HOFFA SCORED BY RACKETS COMMITTEE"
Seattle Post-Intelligencer, March 26, 1958.

"BECK, HOFFA, SCORED BY SENATE RACKET PROBERS: UNION BLASTED"
Seattle Post-Intelligencer, March 26, 1958.

May 3, 10, 1958

On these dates there appeared in the Saturday Evening Post an article, in two installments, entitled "What We Learned About Labor Unions." The article was written by Senator John McClellan, Chairman of the Senate Committee. The article contained numerous accusations and assertions of misconduct against Petitioner. The article reads in part:

> "'Sworn testimony before us exposed, as never before, the crookedness and criminality pervading the leadership of this far-flung organization. Our findings contributed to the retirement of Dave Beck from the presidency of the union, and to the expulsion of the Teamsters from the AFL-CIO. I wish I could hail these as triumphant achievements.
>
> "'The melancholy fact is that, unless and until Congress passes the needed new laws, there can be only faint hope of improvement. Beck's successor as president, James Hoffa, may well be the more dangerous man of the two—younger, craftier, more ambitious, and with even closer ties to the criminal underworld . . .
>
> "'The evidence on the Teamsters has been extensively publicized in the press and on the air waves. Here, therefore, I will touch on only a few high points.
>
> "'In February the still-wealthy Dave Beck, in his home town of Seattle, was tried by a jury, convicted and sentenced to prison for from three to fifteen years for stealing $1,900 from the union he once headed. His lawyers will appeal.

" 'Some commentators have called the sentence "severe" on the sixty-three-year-old Beck. I wish I could share this lenient sentiment. But having listened to all the testimony before our committee—including Beck's own, in which he took the Fifth Amendment 140 times in one session—my sympathy is on the side of his victims. I cannot help noting that figure of $1,900. The sum is such a tiny one, such a little drop in a big bucket, compared to the vast sums—in working members' dues—which Beck misused for his own enrichment, according to the evidence before us.' ".

* * * * * *

" 'Let us see briefly what Dave Beck, Sr., did. From modest beginnings, he was raised by his union to its highest honors. He became a prosperous, nationally prominent and respected citzen. He served on parole boards, and, yes, as president of the Board of Regents of the University of Washington. At one time thousands of his working union members, I understand, trusted and almost revered him. His pink features, his gray hair, his innocent blue eyes inspired affection and trust.

" 'He was greatly trusted, and disgracefully did he betray his trust. Among his friends were some honest men. One of them, at least, saw the way he was going and begged him to draw back before it was too late. He curtly rejected that advice and continued on his devious path with insatiate greed. He oppressed and cheated the working members. He plundered their funds on a grand scale by many slick devices. He dealt secretly with favored employers and their crooked go-betweens, to his own profit and the workingman's loss. He worked with crooks and criminals. He—but why go on? Let us leave him with his regrets. But he still clings to his misbegotten wealth. He still has a $50,000 annual pension and the use of a $160,-

000 home, both provided by the union he betrayed.' "

Throughout the summer of 1958 the Senate Committee continued to hold public hearings concerning the alleged criminal activities of officers of the Teamsters Union, particularly James Hoffa, Petitioner's successor as president. Hoffa was continually linked with Petitioner in one way or another; and in the *Saturday Evening Post* article written by the Chairman of the Committee, he was distinguished from Petitioner only by the statement that he knew "more dangerous criminals than Beck."

Some of the headlines during the summer of 1958 were as follows:

"UNION ASKS BECK OUSTER"
Tacoma News-Tribune, May 10, 1958.

"HOFFA LINK TO $17,500 PAY OFF TOLD"
Seattle Post-Intelligencer, August 6, 1958.

"HERE WE GO ONCE AGAIN"

"Corruption, violence, gangster terror. That is the picture of the Teamsters Union now being re-run in the hearing room of the United States Senate McClellan Committee. . . ."
Seattle Post-Intelligencer, August 8, 1958.

"TEAMSTER BOSS DENIES 'COVERING UP' INCOME"
Seattle Post-Intelligencer, August 8, 1958.

"FIVE UNION LEADERS CHARGED WITH MISUSE OF $10 MILLION"

"PROBERS TOLD OF TEAMSTER BEATINGS"
Seattle Post-Intelligencer, August 27, 1958.

"BECK WON'T LEAVE FANCY BIG SEATTLE HOME VERY SOON"

Daily Olympian, September 9, 1958.

From the "Letters to the Editor" column; caption at the top is "The Old Refrain" and letter reads:

"To the Editor:

"If it is possible, I would like to have in print the full 'refrain' or excuse Dave Beck, the teamster, used in refusing to answer questions. Over and over again the same answer. And how many times did he do this?

(signed) A. T. Frivold
1608 So. "M"

"Editor's note:

"Mr. Beck said, 'I must decline to answer the question, because this committee lacks jurisdiction or authority under articles I, II, and III of the Constitution; further I decline to answer because I refuse to give testimony against myself and invoke the fourth and fifth amendments; and further because the question is not relevant or pertinent to the investigation.'"

Tacoma News-Tribune, September 14, 1958.

"UNION LEADER LIST ISSUED BY RACKETS PROBE UNIT CHIEF"

(This story publicizes a list of 141 Teamster union officials about whom testimony had been adduced relating to improper activities. Beck is on the list.)

Article, *Daily Olympian*, September 22, 1958.

During the summer of 1958 there was in progress in the State of Washington a heated political campaign concerning the submission to the voters of Initiative 202, a measure designed to render unlaw-

ful "union shop" agreements between labor and management. The primary argument employed by the initiative's proponents was that of alleged corruption among labor leaders, particularly appellant, and a great amount of television, radio and newspaper publicity and advertising was devoted to repeating and emphasizing the accusations and "findings" of the Senate Committee. The campaign for and against Initiative 202 was the most intensive involved in the 1958 general election in Washington State. R. 352-353. On October 20, 1958, proponents of the initiative published in four daily newspapers of general circulation within the jurisdiction of the trial court a large advertisement containing a photograph of the personal residence which appellant constructed and lived in during the indictment years herein. The text described the house as "the notorious home of Dave Beck in Seattle," and the caption in large type read as follows:

"OVER $300,000 IN UNION DUES WENT INTO THIS HOUSE!"

On October 23, 1958, supporters of the initiative published in four daily newspapers circulated within the jurisdiction of the trial court an advertisement headed, "UNION DUES AND ASSESSMENTS 'PAID' FOR THESE HEADLINES," and containing photographic reproductions of headlines such as "Beck's Arrest Ordered on Tax Charges," "Dave Beck Is Convicted: Teamster Chief Guilty of Theft," and "Beck Profit in Trust Fund of Widow Told." (R. 355-356, and Exhibits filed November 10, 1958)

During the same period, a major party candidate for United States Senator from the State of Wash-

ington published newspaper advertisements stating that he "Wears No Dave Beck Collar, or Any Man's Yoke!" R. 359.

National magazines continued to give prominent coverage to appellant and the issue of alleged labor corruption. The October 10, 1958 issue of *U. S. News & World Report* featured an article entitled "Can The Labor Racketeer Be Stopped?" R. 324. The November 1958 issue of *The Atlantic* contained an article entitled "Teamsters Defy The Government," reading in part as follows:

> " 'It was one lie after another,' Kennedy recalls the general babbling by Beck. 'We had enough documentary information to know he was not telling the truth . . .'
>
> "Dave Beck was sent sprawling by the avalanche of evidence piled up against him in May, and he retreated to the cover of the Fifth Amendment after documents proved that he had engaged in 'a theft' of from $300,000 to $400,000 in union funds."

On October 20, 1958, a national publishing house published a book entitled *"Treasury Agent: The Inside Story,"* describing investigative activities of agents of the Internal Revenue Service. In a section entitled "The Cheaters," the book contained a chapter entitled "The Fall of Dave Beck." The foreword was written by Robert B. Anderson, the Secretary of the Treasury of the United States, and referred to the persons described in the book as having been investigated as "wrongdoers." R. 348-349.

Prior to the trial Petitioner moved for an extended continuance and change of venue. R. 150, 232. On September 23, 1958, because of the continued activities of the Senate Committee, Petitioner again moved for a continuance of the trial.

R. 244. The final motions for continuance and change of venue, and the challenge to the panel of jurors, were denied and the case proceeded to trial on November 10, 1958. R. 343-344.

In connection with the final motion for continuance, six attorneys representing the American Civil Liberties Union of Washington, Inc. filed a Brief Amicus Curiae. The Brief filed by these attorneys was as follows:

> "The American Civil Liberties Union of Washington, Inc. is an organization of citizens concerned with the preservation of the civil liberties of the American people as guaranteed by the Constitution of the United States, and most particularly by the Bill of Rights.
>
> "One of the paramount rights guaranteed by the Constitution is that of a fair trial. Inherent in the concept of a fair trial are the following conditions:
>
> "1. A public atmosphere where the guilt or innocence of the defendant is not prejudged.
>
> "2. A climate of public opinion which would permit the jury to determine the issues solely upon the evidence adduced in court.
>
> "3. The absence of public pressure which would tend to have a coercive effect on the jury's deliberations.
>
> "It is the earnest belief of the Board of Directors of the American Civil Liberties Union, consisting of educators, newspapermen, doctors, housewives, lawyers, and others, representative of the varied strata of American society, that the defendant Dave Beck could not obtain a fair trial at this time because of the climate of public opinion.
>
> "We believe that under the doctrine of *De-*

Two of these attorneys who signed the Amicus Curiae Brief have subsequently been appointed Judges of the Superior Court, King County, State of Washington.

laney v. United States, 199 Fed. (2d) 107, (1st *Circ.*) 1952, the requirements for a fair trial are presently absent.

"We, therefore, join in defendant Dave Beck's motion for continuance of the trial date.

"Respectfully submitted,

/s/ SOLIE M. RINGOLD,
/s/ KENNETH A. COX,
/s/ EDWARD E. HENRY,
/s/ ROBERT W. WINSOR,
/s/ ARTHUR G. BARNETT,
/s/ LADY WILLIE FORBUS,
Attorneys for the American Civil Liberties Union of Washington, Inc." R. 366-367

Thus, adverse and hostile publicity of a most violent nature, stemming from acts of the Senate Committee,[1] continued through October 1958. During the empanelment of the jury, on November 10, 1958, all of the prospective jurors, including those selected to hear the case, were informed, or rather reminded, of Petitioner's assertion of his privilege against self-incrimination by the following proceedings in connection with the *voir dire* of prospective juror Hamilton.

The Court: "Mr. Hamilton, have you followed closely all that has occurred up until now?

Prospective Juror Mr. Hamilton: "Yes, your Honor.

[1] The connection between the Senate Hearings and publicity relating to the State Court proceedings is manifest. On April 26, 1957 Mr. Robert Kennedy, the Chief Counsel of the Senate Committee, stated that the Committee would assist the grand jury which had been empaneled in King County, Washington (R. 25); and on September 21, 1958, less than two months prior to the date of trial, the Chief Counsel of the Senate Committee declared, on a national television program, that the embezzlement conviction of Petitioner was a "direct result" of the activities of the Senate Committee. R. 253.

The Court: "Do you understand that everything said, every question put, was put to you as an individual?

Prospective Juror Hamilton: "Yes sir.

The Court: "Did you ponder these questions and consider them for yourself?

Prospective Juror Mr. Hamilton: "I have, sir.

The Court: "And what your proper response should be?

Prospective Juror Mr. Hamilton: "Yes, sir."

* * * * * *

The Court: "Now, Mr. Hamilton, did you by chance see a telecast or hear a radio broadcast of any Congressional hearing in which Mr. Beck was referred to?

Prospective Juror Mr. Hamilton: "Yes, your Honor, I did.

The Court: "Was there anything arising out of that experience that caused you to form some opinion, either favorable or unfavorable, of Mr. Beck or his activities or his work or his union service, or anything of that kind?

Prospective Juror Mr. Hamilton: "I mention, your Honor, in all honesty,—

The Court (Interposing): "Just 'yes' or 'no.'

Prospective Juror Mr. Hamilton (Continuing): "I formed an unfavorable opinion of Mr. Beck because of his—

The Court (Interposing): "Don't elaborate on it. You did form an opinion?

Prospective Juror Mr. Hamilton: "Yes, sir, because of the Fifth Amendment." R. 572-574

APPENDIX "B"

DAVID D. BECK, a/k/a Dave Beck,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

No. 16424

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Jan. 20, 1962

As Modified Feb. 14, 1962

Prosecution for income tax evasion and assisting in preparation of false returns. From an adverse judgment of the United States District Court for the Western District of Washington, Southern Division, George H. Boldt, J., the defendant appealed. The Court of Appeals, Barnes, Circuit Judge, held proof that uncertainty as to whether guilty verdict of wilfully evading income tax was based on proof of unreported income coming to defendant as expense money or upon embezzled money required reversal and a retrial.

Affirmed in part and reversed in part and remanded.

Before BARNES, MERRILL and KOELSCH, Circuit Judges.

BARNES, Circuit Judge.

The taxability of embezzled funds has been the subject of legal dispute for several years. This court in 1945, under certain limited facts,[1] held that when an embezzler takes money from an employer with no conceivable claim or colorable claim

1. (a) Proceeds held not as embezzler's funds but as employee's; (b) proceeds never invested (i. e., were gambled away) and which produced no income; and (c) law of Nevada permitted employer to replevin funds, once embezzled; (d) law of Nevada provided embezzler liable to employer for an amount equal to value of embezzled funds.

of right to it, it at no time becomes a taxable "gain" or "profit" or "income" to the embezzler, within the definition of "gross income" as defined in Section 22 of the Internal Revenue Code of 1939 (26 U.S.C. § 22). Wilcox v. Commissioner, 9 Cir. 1945, 148 F.2d 933. This court agreed with the fifth circuit opinion of McKnight v. Commissioner, 1942, 127 F.2d 572, which in turn relied on language used in North American Oil Consolidated v. Burnet, 1932, 286 U.S. 417, 424, 52 S.Ct. 613, 76 L.Ed. 1197. Our opinion distinguished the holding in Helvering v. Clifford, 1940, 309 U.S. 331, 60 S.Ct. 554, 84 L.Ed. 788.

This court's decision was upheld in Commissioner of Internal Revenue v. Wilcox, 1946, 327 U.S. 404, 66 S.Ct. 546, 90 L.Ed. 752, wherein the Supreme Court ruled:

"[A] taxable gain is conditioned upon (1) the presence of a claim of right to the alleged gain and (2) the absence of a definite, unconditional obligation to repay or return that which would otherwise constitute a gain. • • • "; that " • • • the bare receipt of property or money wholly belonging to another lacks the essential characteristics of a gain or profit • • • " (327 U.S. at 408, 66 S.Ct. at 549) unless there exists a *use* of the embezzled moneys, or a *cancellation* of the indebtedness (created by law) for an amount equal to the embezzled funds.

The Supreme Court again had the matter before it in the recently decided case of James v. United States, 1961, 366 U.S. 213, at 215, 81 S.Ct. 1052, at 1053, 6 L.Ed.2d 246:

> "Six years later, this Court held, in Rutkin v. United States [1945] 343 U.S. 130 [72 S. Ct. 571, 96 L.Ed. 833], that extorted money [in 1943] does constitute taxable income to the extortionist in the year that the money is received under § 22(a) of the Internal Revenue Code of 1939. In Rutkin, the Court did not overrule Wilcox, but stated:
>
> " 'We do not reach in this case the factual situation involved in Commissioner [of the Internal Revenue] v. Wilcox, 327 U.S. 404 [66 S.Ct. 546, 90 L.Ed. 752]. We limit that case to its facts. There embezzled funds were held not to constitute taxable income to the embezzler under § 22(a).' Id. [343 U.S.] at page 138 [72 S.Ct. at 576].
>
> "However, examination of the reasoning used in Rutkin leads us inescapably to the conclusion that Wilcox was thoroughly devitalized.".

The Supreme Court in James then pointed out that Rutkin's claim was no greater than that of Wilcox; that both had obtained money by means of a criminal act; that neither had a bona fide claim of right to the funds; that both could be required to make restitution, i. e., "the right to recoupment exists in both situations." Thus, "the Wilcox rationale was effectively vitiated by this Court's decision in Rutkin," as several circuit courts have previously stated. "Wilcox was wrongly decided."

The court then stated:

> "When a taxpayer acquires earnings, lawfully or unlawfully, without the consensual recognition, expressed or implied, of an obligation to repay and without restriction as to their disposition, 'he has received income which he is required to return, even though it may still be claimed that he is not entitled to retain the money, and even though he may still be adjudged liable to restore its equivalent.' North American Oil [Consolidated] v. Burnet, supra [286 U.S.], at p. 424 [52 S.Ct. at p. 615]. In such case, the taxpayer has 'actual command over the property taxed—the actual benefit for which the tax is paid.' Corliss v. Bowers, supra [281 U.S. 376, 50 S.Ct. 336, 74 L.Ed. 916]. This standard brings wrongful appropriations within the broad sweep of 'gross income'; it excludes loans. When a law-abiding taxpayer mistakenly receives income in one year, which receipt is assailed and found to be invalid in a subsequent year, the taxpayer must nonetheless report the amount as 'gross income' in the year received. United States v. Lewis, supra [340 U.S. 590, 71 S.Ct. 522, 95 L.Ed. 560]; Healy v. Commissioner, supra [345 U.S. 278, 73 S.Ct. 671, 97 L.Ed. 1007]. We do not believe that Congress intended to treat a lawbreaking taxpayer differently." Id., 366 U.S. at 219-220; 81 S.Ct. at 1055.

However, in James, because a felony conviction must rest upon a *willful* failure to account, or a *willful* attempt to evade taxes (Spies v. United States, 1943, 317 U.S. 492, 63 S.Ct. 364, 87 L.E. 418), and *specific intent* must be proved by independent evidence and cannot be inferred from the mere understatement of income (Holland v. United States, 1954, 348 U.S. 121, 139, 75 S.Ct. 127, 99 L.Ed. 150), a divided Supreme Court ruled that the "gloss put upon [the statute] by Wilcox" prevented a conviction for "failing to include em-

2 See note 6, James v. United States, 1961, 366 U.S. 213, 81 S.Ct. 1052, 6 L.Ed.2d 246

bezzled funds in gross income in the year of misappropriation," while Wilcox was the law of the land.

With this clarification of the law on the taxability of embezzled funds before us (which did not exist at the time of trial below), we turn to the facts of the instant case.

Appellant Dave Beck was indicted in May 1957 on two counts, one under 26 U.S.C. § 145(b), the other under 26 U.S.C. § 3793(b) (1).[3] In August he was indicted by the same grand jury on three additional counts under § 145(b), on two additional counts under § 3793(b) (1), and with codefendants under 18 U.S.C. § 371 on two counts charging a conspiracy to evade payment of his taxes. The seven counts which named Beck alone were segregated for trial. The trial began in November 10, 1958. At that time the government dismissed one of the counts against appellant. In February 1959 a jury returned verdicts of guilty as to the remaining six counts. Appellant was sentenced to five years imprisonment, and required to pay costs amounting to about $11,000 and various fines totaling $60,000. This court has jurisdiction on appeal. 28 U.S.C. § 1291. Appellant was sentenced to five years imprisonment on each of the six counts on which he was convicted, the sentences to run concurrently. He was also sentenced to pay

3. 26 U.S.C. 1952 ed., Sec. 145 (b) reads as follows:

"§ 145. **Penalties**

* * * * * *

"(b) **Failure to collect and pay over tax, or attempt to defeat tax.** Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

4. 26 U.S.C. 1952 ed., Sec. 3793(b) (1) reads as follows:

"§ 3793. **Penalties And Forfeitures.**

* * * * * *

(b) **Fraudulent returns, affidavits, and claims.**

"(1) **Assistance in preparation or presentation.** Any person who willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a false or fraudulent return, affidavit, claim, or document, shall (whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document) be guilty of a felony, and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

fines of $10,000 on each count, or a total of $60,000, and to pay costs amounting to about $11,000.

If the sentences were wholly concurrent, one count free from error would sustain the conviction; that is, we would look no further. See, for example: Sinclair v. United States, 279 U.S. 263, 299, 49 S.Ct. 268, 73 L.Ed. 692; Abrams v. United States 250 U.S. 616, 619, 40 S.Ct. 17, 63 L.Ed. 1173; Russell v. United States, 9 Cir. 1961, 288 F.2d 520, at 522 (and cases there cited); Hattem v. United States, 9 Cir. 1960, 283 F.2d 339, 341; Green v. United States, 9 Cir. 1960, 282 F.2d 388, 392; King v. United States, 9 Cir. 1960, 279 F.2d 342, 344.

Hereinafter, we uphold the convictions on two counts, but examination of all counts here became necessary because of the separate fine assessed on each count. As will appear, we find reversal on four counts necessary. The judgment for costs will stand.

FACTS

During the period from 1950 to 1953 appellant misappropriated to his own personal use some $365,000 of the funds of the various union entities with which he was associated. This amazing series of embezzlements is detailed in the appellee's brief (pages 31-86). It would serve no useful purpose to repeat the details here. Beck and certain of his close associates had the power to sign checks on the accounts of certain union entities. Checks on these various accounts were used to pay Beck's personal bills, to purchase property in his name, or to pay sums to third persons who used the money to Beck's advantage.

There was further proof (the materiality of which hereinafter becomes evident) of instances in which Beck received expenses for various travels from two sources, either being reimbursed by two labor organizations for the same trip, or being reimbursed once and charging the trip on credit cards payable at a later time by the union. Travel expenses totaling $35,000 were claimed and paid to Beck but were not used by him to pay the cost of travel on the union's behalf.

During the period that the grand jury met to indict Beck on this charge, there was considerable adverse publicity in the communications media concerning his refusal to testify before a congressional committee as to certain matters. Beck has been

convicted of embezzlement in the state court of Washington on a charge of dealing with a very small portion of the funds which form the basis of this case.

On this appeal Beck asserts some twenty-five specified errors which may be summarized as follows:

1 That appellant was deprived of an unbiased grand jury.

2 That appellant was deprived of an unbiased petit jury.

3 Error was committed in the restriction of the cross-examination of government witness Hupf.

4 That the funds taken were either embezzled or borrowed, and neither source would constitute taxable income.

5 If embezzled funds did constitute taxable income, the state of the law was such that no one could knowingly willfully evade taxes thereon.

6 Failure of proof on the counts concerning the Joint Council Building Association returns. These are the so-called "900" counts charging the aiding, assisting and filing of false union returns.

7 Error in admitting evidence of destruction of appellant's records, and in instructing the jury thereon.

8 Error in admitting evidence of appellant's refusal to cooperate with the Internal Revenue Service, and in instructing the jury thereon.

We will consider each of these eight contentions of appellant in turn, with four and five considered together.

I

Was appellant deprived of an unbiased grand jury?

1 At the time the grand jury returned the indictments which were the subject of this prosecution in 1957, appellant was very much in the headlines as a corrupt labor boss. Many of the newspaper headlines were introduced as exhibits below, and are reproduced in the brief. There was a high concentration of such headlines in the State of Washington where appellant lived and was indicted. From this evidence appellant urges that it is apparent that he was denied his right to an

1 Appellant summarizes these under nine "parts" of his argument. We reduce the number to eight by consolidating four and five which are really one, as four

impartial grand jury. *There was no evidence that in fact the grand jury was prejudiced or that any member thereof had been affected by the vast amount of publicity accorded Beck.*

[2] The cited cases which have reversed convictions have been based on something more than exists here. The usual case concerns the systematic exclusion of some certain class or classes of citizens, from which it can be strongly inferred that prejudice has resulted. The civil rights protected in these cases are bigger than the rights protecting any criminal or criminal class from the unfavorable publicity resulting from their own corrupt or illegal acts. We rule that a specific showing of prejudice is necessary to make erroneous the action of the trial judge in refusing to dismiss the indictment. The court here so ruled following an *in camera* examination of the minutes of the grand jury. We find no error.

II

Was appellant deprived of an unbiased petit jury?

[3] The trial judge refused a final motion to continue the trial or change venue. It is asserted this was error and caused appellant to be tried before a prejudiced petit jury. Prior to the final denial the following continuances of the appellant's trial had been granted by the trial court:

6. From appellant's brief we quote, after a reference to the Washington law defining embezzlement:

"It was under this statute that appellant was convicted in 1957 of embezzling $1900 from the Western Conference of Teamsters.

"The evidence in the present case shows beyond dispute that appellant in his capacity as officer and employee, was in custody and control of the finances of the union organizations involved, and that he withheld and appropriated the same to his own use (whether as a loan or otherwise) without the knowledge of the governing boards of officers of the organizations. He 'directed and controlled' the operations of the unions (Tr. 6099) and was 'in possession' of their funds (Tr. 4825). He was signator to their bank accounts and unilaterally issued checks drawn thereon. He did not render accountings or financial statements to the unions, the handling of financial matters was left largely to him, and he was not required to give reasons or make representations as to the purposes for which he was dispensing union funds (Tr. 4353, 4359, 4363, 4366, 4374-4376, 4380, 4409-4410, 4440, 4444-4450, 4458, 4895, 4898, 4970, 5103-5104, 5109, 6006, 6022-6029).

"There was no evidence to support a conclusion that appellant obtained the funds by false pretenses or any comparable means. If not loans, the acquisitions were purely the proceeds of embezzlement, as that term has been defined both historically and by modern statute." (Brief of Appellant, pp. 69-70.)

(a) October 28, 1957: for a period of six months.
(b) January 21, 1958. for a period of six weeks.
(c) April 1958: indefinitely.

The trial commenced on November 10, 1958, over a year and six months after the indictments had been found. (May 1957).

The appellant points to all the newspaper publicity existing before the public during the period previous to his trial, as evidence as a matter of law that it would have been impossible to find a panel of jurors which did not have information about the case obtained outside the courtroom. He relies largely on Delaney v. United States, 1 Cir. 1952, 199 F.2d 107, to prove this error.

In Delaney the government activities which created the prejudice complained of were much more contemporaneous with the trial than is the case here. The first motion made by defendant Delaney for a continuance of his trial, denied in the district court and found error by Judge Magruder, was made on November 15, 1951, *two months* after the original indictment (found September 14, 1951). His second motion, made November 29, 1951, was granted and a one-month continuance was given Delaney. His third motion, made January 3, 1952, (three and a half months after the original indictment) was denied. The court in Delaney recognizes that "the prejudicial effect of * * * publicity" cannot "be said * * * as a matter of law" to be "so permanent, and ineradicable by mere lapse of time" that a fair trial "at any time within the foreseeable future" was impossible. (199 F.2d at 112.)

Here the indictments were all over fifteen months old, congressional hearings had not concerned Beck for more than a year, and his embezzlement conviction in state court was over ten months old. There was some continuing publicity about Beck, but it seems obvious that it would be impossible ever to bring this defendant to trial if it were necessary to await a complete abatement of all publicity concerning a man so much in public view.

A careful review of the record as to voir dire testimony of the empaneled jurors is required of this court. Irvin v. Dowd, 1960, 366 U.S. 717, 722, 81 S.Ct. 1639, L.Ed.2d 751. We believe the judge conducted the voir dire in an able and admirable fashion, particularly in view of the difficulties under which he labored.

[4] While the juror must be "indifferent as he stands unsworne," it is

> " * * * not required however that the jurors be totally ignorant of the facts and issue involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. Spies v. [People of State of] Illinois, 123 U.S. 131 [8 S.Ct. 21, 31 L.Ed. 80]; Holt v. United States [218 U.S. 245, 31 S.Ct. 2, 54 L.Ed. 1021; Reynolds v. United States], 98 U.S. 145 [25 L.Ed. 244].
>
> " * * * As stated in Reynolds, the test is 'whether the nature and strength of the opinion formed are such as in law necessarily * * * raise the presumption of partiality. The question thus presented is one of mixed law and fact * * *.' At p. 156 of 98 U.S. 'The affirmative of the issue is upon the challenger. Unless he shows the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality, the juror need not necessarily be set aside * * *. If a positive and decided opinion had been formed, he would have been incompetent even though it had not been expressed.' At p. 157 of 98 U.S. As was stated in Brown v. Allen, 344 U.S. 443, 507 [73 S.Ct. 397, 446, 97 L.Ed. 469], the 'so-called mixed questions or the application of constitutional principles to the facts as found leave the duty of adjudication with the federal judge.' " (366 U.S., at 722-723, 81 S.Ct. at 1642.)

[5] For us to hold that the trial judge committed error as a matter of law would mean that a judge could never determine that the effect of prejudicial publicity could ever die down to a point where it was no longer prejudicial. Cf. Stroble v. State of California, 1951, 343 U.S. 181 at 193, 72 S.Ct. 599, 96 L.Ed. 872. The result would be that no public figure could ever be tried so long as one derogatory news item concerning him appeared in the public press. This we cannot and will not hold. The area of the trial judge's discretion must be large.

Lisenba v. People of State of California, 1941, 314 U.S. 219 at 228, 62 S.Ct. 280, 86 L.Ed. 166. And "the findings of the trial court upon that issue [the force of a prospective juror's opinion] ought not to be set aside by a reviewing court, unless the error is manifest." Reynolds v. United States, 1878, 98 U.S. 145, 156, 25 L.Ed. 244, quoted with approval in Irvin v. Dowd, supra

The principal charge of prejudice existing against defendant and appellant Beck relates to Juror Hamilton. *He was excused by the trial judge.* It is true that he made a specific explanation as to why he was prejudiced against Beck—this resulted in a motion for a mistrial, which was denied. An admonition to the jury was promised by the trial court and was given.

We find no "manifest" error—no clear and convincing proof of prejudice existing in the mind of any juror finally accepted and empaneled.

III

Was there error in restriction of certain cross-examination?

[6, 7] The final government witness, Hupf, testified to conclusions drawn from the evidence in the trial as a whole, and presented these conclusions in the form of a summary or balance sheet of appellant's finances, showing his increase in net worth over the indictment years. (The government used the net worth plus expenditures method of proof of income, since the taxpayer's records had been destroyed.) Hupf's cross-examination was restricted. The appellant characterizes this restriction as a refusal to allow him to test the conclusions of the witness by ascertaining the basis for them. The questions concerned the reason for the expert's failure to include the amount of admittedly embezzled funds as liabilities of appellant, when he constructed the balance sheet. The government contends that the court was merely preventing the defense from quibbling with the witness over a point of law, and further points out that the cross and voir dire-examination of the witness was generally unrestricted and voluminous, covering some two hundred pages of the record. The rulings complained of are on pages 10,463-4 and 10,466-7 of the transcript. We have examined these and find no error. The extent to

which cross-examination of a witness will be allowed rests in the sound judicial discretion of the trial court. We find no abuse of that discretion. District of Columbia v. Clawans, 1937, 300 U.S. 617, 632, 57 S.Ct. 660, 81 L.Ed. 843; Alford v. United States, 1931, 282 U.S. 687, 694, 51 S.Ct. 218, 75 L.Ed. 624; United States v. Johnson, 9 Cir., 1961, 285 F.2d 35, 40, and cases there cited.

IV and V

The taxability of embezzled funds.

[8] With this alleged error we reach the heart of appellant's case. Almost all, but not the entire sum, which was unreported as income by Beck was embezzled funds. Beck, on appeal, admits that the jury was presented the problem of determining whether the funds constituted a loan from the union to Beck (in which case they were instructed to acquit) or embezzled funds (in which case they were instructed to convict). Appellant admits that the finding of guilty meant that the jury considered those funds allegedly embezzled to have been embezzled, and income.

The James case, supra, does not change the rule that a failure to report income realized through criminal activities *other than embezzlement* (as for example, larceny by false pretenses) may be punished criminally as a willful tax evasion for failure to report income.

But, says appellant, here there was in the record evidence "from which it could be inferred that appellant had authority to lend union moneys to himself, or others." The court left that issue to the jury, and instructed the jury that proceeds from loans do not constitute taxable income. The jury verdict impliedly rejected the theory of a loan. Hence, says appellant, *the only possible alternative conclusion* is that the jury found the funds were embezzled.

The government disputes the validity of such a simple conclusion, maintaining that the evidence discloses that (1) it could have been found by the jury to be compensation for services rendered, for Beck so treated and so considered the sums

taken by him, hence there could be no willful violation of a state law defining embezzlement; and (2) even if Beck intended to embezzle, as defined by Washington law, he never had lawful possession of the union funds as such, so as to permit embezzlement.

Obviously, if Beck did obtain the money as compensation for services rendered, he was required to pay taxes thereon. Therefore we reject the conclusion that the moneys received by Beck were necessarily loans, or embezzled funds, and could be nothing else. They could have been found to have been either simple compensation or funds obtained by criminal activities other than embezzlement.

But we cannot read the jury's mind. If the jury found the unreported cash to be either embezzled or obtained from other criminal activities or compensation for services rendered, the jury could have found Beck guilty. It was only if they were found to be loans that Beck would be found not guilty. (We here are temporarily not concerned with the rule of the Wilcox, supra, case, or the effect of Rutkin, supra, on that rule, or Beck's knowledge of or reliance upon those cases or any others.)

[9] Entirely apart from the larger sums of money either embezzled or paid as compensation or obtained as a loan or obtained through other criminal (non-embezzling) methods, the government points to the fact that there were moneys paid as reimbursement for travel expenses which allegedly would clearly fall within the fourth class of receipts mentioned above, funds obtained through criminal but nonembezzling methods. There having been but a general verdict and no special verdicts entered below, we have no way of determining whether the double receipt of travel money was or was not relied on by the jury to convict the appellant. As appellant correctly states in his brief, "When two theories are submit-

7. (1) The evidence discloses that Beck was paid no salary but had unlimited authority, intentionally granted by the union, to take any and all funds he desired.

(2) There was testimony Beck could have named for himself any salary he desired.

(3) There was evidence no accounting was ever required of Beck.

(4) There was in evidence the conduct of the union after Beck's indictment, including the execution of the accord and satisfaction entered into. (Pl. Ex. 692) between Beck and the union.

ted to a jury, one of which is incorrect, a general verdict of guilty must be reversed even though the jury was properly instructed upon the alternate theory." Williams v. State of North Carolina, 1942, 317 U.S. 287, 63 S.Ct. 207, 87 L.Ed. 279; Stromberg v. People of State of California, 1931, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117.

These "expense moneys" which wound up in appellant's control are distinguishable from loans and embezzled funds. To fully understand the matter we refer to and adopt the resume of appellant with respect thereto.

8. At all times material, appellant traveled extensively and received from union entities substantial sums by way of travel and expense allowances and advances, which sums were not in fact expended by him for such purposes. As an officer of the International Union, he carried a credit card issued by that organization on which he charged transportation costs. (Tr. 7363-7364.) In addition, he was entitled to a "hotel allowance" of $15 a day when in travel status and on occasion received considerably more, a per diem allowance of first $5 and later $7.50 a day, whether traveling or not, and, beginning in 1953, a car allowance of $150 a month. (Tr. 7308-7309, 7559.) The hotel and other allowances, plus miscellaneous expenses such as cab fares and sundry items, were claimed by appellant on monthly salary and expense statements which he submitted to the International Union. (Exhibits 778 through 788K; Tr. 7302.) In these statements appellant sometimes claimed a hotel allowance of as high as $40 a day. The monthly vouchers were prepared by his secretary, Ann Kotin, partly from information already in her possession, and partly from information given to her by appellant. His salary and expense checks from the International Union were deposited in his wife's bank account. (Tr. 6709-6720, 6732.)

In most instances, the hotel and travel allowances which appellant received from the International Union were not in fact expended by him for such purposes. For example, after appellant assumed the presidency of the International Union in late 1952, he continued to maintain his permanent residence in Seattle, with offices in both Seattle and Washington, D. C. When in Washington, he claimed and received the regular hotel allowance of $15 a day but stayed in an apartment at the Woodner, the rent for and expenses of which were paid by the International Union. (Tr. 6695-6696, 6720-6722, 7493.) On many other occasions during the indictment years when appellant's hotel bills were paid directly by the International Union, he nonetheless claimed and received the regular hotel allowance for the same travel. (The hotel bills which the International Union paid for appellant contained not only room charges but charges for such extras as meals, telephone calls, valet service, auto rental and sundries. (See, e. g., Tr. 7440.) No other staff member of the International Union was accorded such a "privilege." (Tr. 7561.) Moreover, appellant was accompanied by his wife on some of his travels and her expenses on these occasions were also paid by the International Union. Tr. 7395-7415, 7425-7449.)

On other occasions, appellant was reimbursed for the same travel by more than one union entity. For instance, in February 1950 he attended meetings in Miami, Florida, of the executive boards of the International Union and the American Federation of Labor. His air transportation to and from Miami was charged to the International

The receipt of such expense money in certain years may well distinguish this case from the James case. If such expense money is found by the trier of fact to have been acquired other than by embezzlement, then the James case is not controlling. Recognizing this, appellant in his supplemental brief filed after the decision in the James case, urges us to take the position that "the evidence is insufficient as a matter of law on the issue as to whether the expense moneys constitute income."

Because the government produced records of hotel bills in only eleven cities of the United States, says appellant, there is no proof he did not spend the moneys doubly paid him for services in such named cities to *other* hotels, or in *other* cities. Such expenses were heavy, says appellant. This can be admitted, but does not solve the problem.

[10] Once the government proves unreported receipts by a taxpayer, has allowed all the deductions claimed in taxpayer's return, has allowed all deductions developed and discovered in the government's investigation, where it has exhausted all leads suggested or provided by the taxpayer indicating in-

Union. In the voucher which he submitted to the International Union for this month, he claimed and received a hotel allowance of $40 a day for the 19 days he was in Miami. While in Miami, he attended a concurrent meeting of the executive board of the Union Label Trades Department of the American Federation of Labor. For attending this concurrent meeting, appellant claimed and received from the Union Label Trades Department, a fee and traveling expenses totaling $687.35. (Tr. 7184-7204, 7391-7395, 7420-7423.) In August 1950 and January 1951, he again received payments under similar circumstances in the amounts of $498.63 and $541.71, respectively, from the Union Label Trades Department. (Tr. 7198, 7284.)

On another occasion, appellant included in an expense voucher submitted to the International Union one item which he did not in fact pay, and another which was personal in character. Thus, in the voucher which he submitted to the International Union for the Month of January 1953, he claimed and received reimbursement for a "consultation expense" of $128.70, allegedly paid to Wampold. (Tr. 7323-7324.) The latter denied having received any such fee from appellant. (Tr. 6985-6986.) Included in the same voucher was an item of $125 paid by appellant to his investment counselor, Loomis.

Moreover, the International was not the only union entity which paid hotel bills and travel expenses of appellant. At appellant's direction hotel bills and restaurant checks were frequently mailed to him at a post office box address in Seattle. Upon his return to Seattle, appellant would then direct McDonald to prepare Western Conference or Joint Council No. 28 checks in payment of these bills. McDonald entered the checks in the books as officers' or convention expense. Tr. 4464-4467.) Appellant never submitted to McDonald any expense voucher or statement other than an occasional hotel bill—in support of these checks. But all other officers and employees of the

come and deductions, and where the taxpayer chooses to refuse to supply any additional information, the government has established a *prima facie* case, if the income exceeds the deductions and was not reported as taxable. United States v. Bender, 7 Cir. 1955, 218 F.2d 869; United States v. Stayback, 3 Cir. 1954, 212 F.2d 313; Clark v. United States, 8 Cir. 1954, 211 F.2d 100, 103; Remmer v. United States, 9 Cir. 1953, 205 F.2d 277; United States v. Link, 3 Cir. 1952, 202 F.2d 592, 593; United States v. Hornstein, 7 Cir. 1949, 176 F.2d 217, 220; Barrow v. United States, 5 Cir. 1948, 171 F.2d 286, 287. But see Cohan v. Commissioner, 2 Cir. 1930, 39 F.2d 540, 543-544.

Thus the proof of such unreported income coming to Beck as expense money could support a verdict of guilty of willfully evading the tax. Is that the basis of the jury's verdict in this case, or was it embezzled money? We cannot read the jury's mind, and we conclude it becomes necessary to reverse the conviction of Beck on the four counts relating to tax evasion and order a retrial of that issue, at which time such additional evidence, instructions and special verdict or verdicts, if any, may be placed before the jury as may be deemed necessary by

Western Conference and Joint Council including Brewster (Tr. 5643, 5673-5674) were required to submit expense vouchers. (Tr. 4467-4471, 4805-4808, 4839, 4882-4885.) Appellant's secretary handled all his regular mail but not mail received by him at the post office box, and she had no knowledge of the fact that he was receiving traveling expenses from union entities other than the International. (Tr. 6711, 6762-6763.) Irrespective of what union entity paid his hotel bills, whenever appellant was away from Seattle the International Union was billed for the regular hotel allowances.

Appellant did not report in his returns for any of the years in question the receipt of any travel allowances or other such expense monies. (Tr. 10,297-10,310; Exhibits 6 through 9.) In an effort to determine what amounts were actually received and expended by appellant, personally, for travel during the indictment years, Special Agent Gordon Skelton, among other things, solicited hotels in twenty-five major cities in the United States and Hawaii. The agents also analyzed in detail the various bank accounts of appellant and his wife.

During the years 1950, 1951, 1952 and 1953, appellant received from the International Union alone travel allowances totaling $8,188, $7,901, $8,639 and $14,345, respectively. (Tr. 9532-9533.) His known hotel bills for the same period totaled $17,695, of which sum $16,578 was paid by union entities. (Tr. 9535-9539.) No hotel bills or other travel expense were paid by checks drawn on the personal bank accounts of appellant or his wife. (Tr. 9559, 9564-9565.) An analysis of the bank accounts, and of all known receipts and expenditures of appellant, disclosed that he had no cash available from reported income with which to pay travel expenses. Accordingly, appellant could not have expended any cash for travel expenses without increasing further the bulge between his reported and his true income for the period. (Tr. 9896-9905, 9917-9918, 10,297-10,310.)

the trial court in view of the law as it has developed since the previous trial, with particular reference to the teachings of the James case, supra.

VI

Insufficiency of the evidence to support the verdict as to the two counts ("900 Counts") involving returns of the Joint Council Building Association for the years 1950 and 1952.

[11] The appellant asserts the insufficiency of the evidence on these counts because Exhibits 50 and 51 were signed by Brewster, the secretary-treasurer of the union, and by McDonald, the bookkeeper, and prepared by the latter "unassisted, uninstructed, and entirely on the basis of his own assumptions plus a minimal amount of information from John Lindsey, Jr., the building contractor."

The Joint Council Building Association filed its "990" returns each year from 1941 through 1950, 1952 and 1953. The 1942 and 1945 returns were signed by appellant. The 1951 return was delivered to appellant's office for signature by McDonald, because the payments of amounts in excess of $90,000 to John Lindsey, Jr., were "extraordinarily high," and McDonald wanted Mr. Beck to pass on their correctness. (Some $46,000 of the amount paid Lindsey in 1951 was for the personal use and benefit of appellant. (Tr. 10,172-10,173.) This "990" form for 1951 was never filed.

The 1950 and 1952 "990" forms *were* filed. The record substantiates the government's contention that they were false in the following particulars:

> "The return for 1950 (Ex. 50) reflected an expenditure by the Association of $16,718 for building payments and alterations. Of this sum $13,590 was in fact applied by appellant to his own use and benefit. In addition, the 1950 return reflected an expenditure by the Association in the amount of $18,000 for new construction. Of this sum $8,000 was for the personal benefit of appellant. (Tr. 10,165-10,167.)
>
> "The return for 1952 (Ex. 51) reflects an expenditure by the Association of $54,838 for building payments, alterations and improvements. This entire sum was applied by appellant to his personal use and benefit. It was also reported in the return for 1952 that the Building Association had expended the sum of $15,084 for building equip-

ment, supplies, services and repairs. Of this sum $1,368 was paid to a plumbing firm for work done for appellant personally. (Tr. 10,167-10,171.)" Appellee's Brief, pp. 84-85.

Once the falseness of the returns are established (and appellant fails to attack their falseness), there exists but one ground for reversal on these counts (which appellant urges), to wit, that there is in the evidence no more than a remote suspicion that appellant knew such returns existed.

We read the record otherwise. Beck had himself signed such Form 990 returns in 1942 and 1945. Beck also signed yearly Form 990 returns for the Western Conference Pension Trust Fund, of which he was trustee. McDonald *usually* signed the Joint Council 990 forms. Copies of each were then placed in the corporate files.

The 1945 Building Association Form 990 (Ex. 45), *signed by Beck*, was false with respect to payments to Lindsey. Payments to him amounting to $5,250 were made by the Building Association, but were for work done by Lindsey on behalf of Beck personally.

We note that on this issue as to the detailed knowledge of the operation of the union and its affiliates and its complete one-man control by Beck, appellant blows both hot and cold on the issue of Beck's knowledge of what was in the 990 forms there exists, say his counsel, only suspicion that he knew their content. We compare that with the admitted and self-professed single-man control of "the union organizations" by appellant—the lack of *any knowledge* in the governing boards of the corporations—the complete "direction" and "control" by Beck—his "possession" of all moneys and bank accounts—his lack of accountability to anyone for what he did or did not do—financially or otherwise. (See note 6, supra.)

We cannot agree that there existed merely a suspicion of appellant's knowledge as to the returns or that he did not have full knowledge of them and of their content. Nor can we agree that "the circumstantial evidence leads as rationally to a conclusion of innocence as to one of guilt." There was ample evidence to go to the jury on the two "990 counts" and to permit the jury to return a verdict of guilty. This it did. Its finding we will not disturb. We affirm appellant's conviction as to these two counts.

VII

The alleged error in admitting evidence concerning the loss or destruction of certain financial records of the union, and the instructions with regard thereto.

[12] The appellant was willing to and did, stipulate at the trial that *all* records of the union entities and of Beck, which might aid the government in reconstruction of Beck's financial dealings in the years in question, were destroyed. The trial judge allowed the government to introduce evidence of this destruction over objection by Beck. Beck now contends that in view of the stipulation mentioned, the only purpose served by this evidence was to prejudice Beck in the eyes of the jury. The government introduced the evidence purportedly to lay the foundation for the use of the net worth method. The government points out that the proof necessary to such a foundation is a matter of the discretion of the trial judge, and that abuse of that discretion is not here shown.

[13, 14] Beck complains of the instruction given in relation to the destruction of the records, in view of what he calls a complete lack of direct evidence to connect him with the destruction. Beck's complaint addressed to the language contained in instruction No. 19 does not produce conviction.[9] It relies on an emphasis supplied by the appellant, to have any relevance whatever. It is favorable to appellant in its only mention of him. The judge instructed the jury that the fact of destruction, standing alone, had no significance, and appellant complains of undue emphasis allegedly placed on the "standing alone" portion, and asks this court to assume that the jury drew a negative inference from the asserted emphasis. This we will not do. Instructions must be considered as a whole. The jury was properly instructed (Stoneking v. United States, 8 Cir. 1956, 232 F.2d 385, 389), and we must assume it followed

9. "Evidence has been received during the trial concerning the loss or destruction of certain records of several persons or organizations, including the Western Conference of Teamsters, Joint Council Building Association, and records of certain banks. Such evidence was permitted for the purpose of laying the basis for the presentation of certain matters by oral testimony, and as a basis for allowing the use of the net worth method, which I will explain to you later. Therefore, you are instructed that the loss or destruction of any such records, in and of itself—that is, standing alone, shall not be considered as a fact adverse to the defendant." (Instruction 19, R. 714.)

such instructions without confusion (United States v. Davis, 7 Cir. 1960, 281 F.2d 93, 100).

VIII

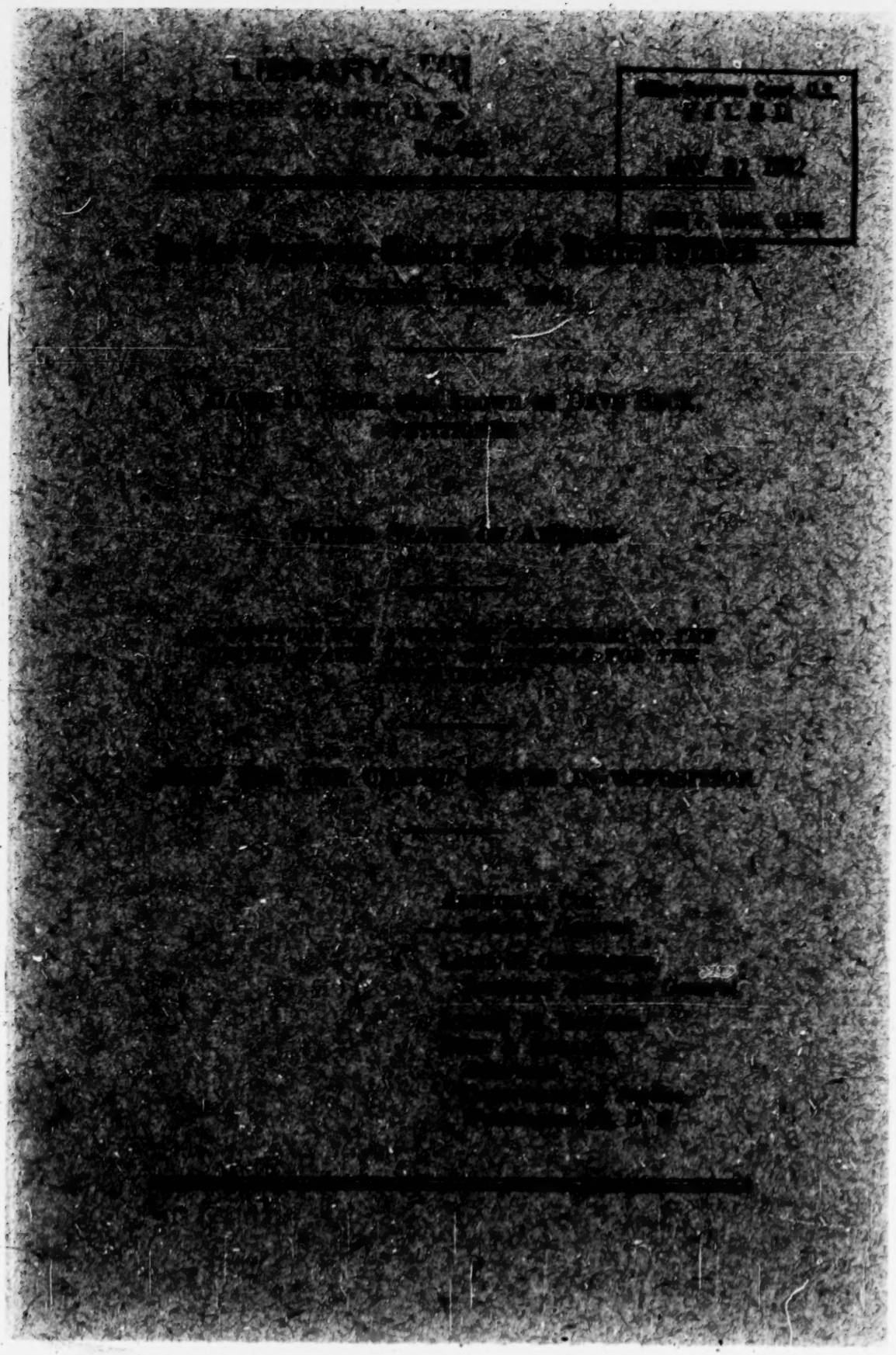
Was there error in admitting evidence of appellant's refusal to turn over his records to, or discuss his taxes with, the Internal Revenue Service agents, and in instructing the jury with respect thereto?

[15, 16] First, we must say we agree with the government that appellant has failed to comply with Rule 18(2) (d) of this court, 28 U.S.C. That rule requires the full substance of the evidence on the subject to be fairly stated. Such evidence is not fairly or fully stated when appellant merely charges "Such testimony [relating to appellant's refusal to turn over his records to the Internal Revenue Service agents] was permitted in far greater degree than necessary for the purpose of laying a foundation for appellee's use of the net worth method." It is fundamental that *some* foundation along such lines was required before the government could proceed under its theory of the case. The amount of foundation is always largely a matter of judicial discretion in the trial court. Beard v. United States, 4 Cir., 1955, 222 F.2d 84, cert. denied, 350 U.S. 846, 76 S.Ct. 100 L.Ed. 753. That discretion was not here abused, either in permitting the evidence to go in, or in refusing the appellant's requested instruction No. 20 with respect to it.[10]

Therefore, while it would be perfectly proper for us to disregard such alleged error because improperly raised, we prefer to consider the question properly raised, and hold there was no error in either of the court's rulings, i. e., either as to its admission or as to the instructions given concerning it.

In summary, the conviction of appellant on the two "990" counts (26 U.S.C. § 3793 (b) (1) are *affirmed;* the conviction of appellant on the four counts of income tax evasion are reversed and set aside, and such four counts are remanded for a retrial in the district court.

10. When the court declined to give this instruction as an incorrect statement of the law, then counsel for appellant conceded that the instruction, as requested, was not a correct statement of the law. (Tr 10,642-10,644.)



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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 927

DAVID D. BECK, also known as DAVE BECK,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. "B") is reported at 298 F. 2d 622.

JURISDICTION

The judgment of the court of appeals was entered on January 20, 1962 (C.T. 4),[1] and the petition for

[1] "C.T." references in this brief are to the clerk's transcript of the proceedings in the court of appeals. References preceded by "R." are to the printed record in two volumes;

rehearing was denied on March 7, 1962 (C.T. 5). The time for filing a petition for a writ of certiorari was extended to May 4 by orders of Mr. Justice Douglas, and the petition was filed on May 2, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED:

1. Whether the trial court erred in denying petitioner's motion to dismiss the indictments on the ground that the proceedings of the grand jury were conducted in an atmosphere of community prejudice against him.

2. Whether the trial court abused its discretion in denying petitioner's motions for change of venue and for a further continuance of the trial date, also predicated on the claim that the climate of public opinion was prejudicial to him.

3. Whether the evidence is sufficient to support the verdict of guilty on two counts relating to the filing of false information returns (the so-called "990 counts").

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Constitution of the United States:

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a present-

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those preceded by "Tr." are to the typewritten transcript of proceedings at the trial, consisting of 113 volumes, designated Vols. 1A through 60A, covering 10,997 pages.

ment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Internal Revenue Code of 1939:

SEC. 3793. PENALTIES AND FORFEITURES.

* * * * *

(b) *Fraudulent Returns, Affidavits, and Claims.*—

(1) *Assistance in preparation or presentation.*—Any person who willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a false or fraudulent return, affidavit,

claim, or document, shall (whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document) be guilty of a felony, and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

• • • •

(26 U.S.C. 1952 ed., Sec. 3793.)

Federal Rules of Criminal Procedure:

RULE 6. *The Grand Jury*

• • • •

(b) *Objections to Grand Jury and to Grand Jurors.*

(1) *Challenges.*—The attorney for the government or a defendant who has been held to answer in the district court may challenge the array of jurors on the ground that the grand jury was not selected, drawn or summoned in accordance with law, and may challenge an individual juror on the ground that the juror is not legally qualified. Challenges shall be made before the administration of the oath to the jurors and shall be tried by the court.

(2) *Motion To Dismiss.*—A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualification of an individual juror, if not previously determined upon challenge. An indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified if it appears from the record kept pursuant to sub-

division (c) of this rule that 12 or more jurors, after deducting the number not legally qualified, concurred in finding the indictment.

* * * *

RULE 21. *Transfer From the District or Division for Trial*

(a) *For Prejudice in the District or Division.* The court upon motion of the defendant shall transfer the proceedings as to him to another district or division if the court is satisfied that there exists in the district or division where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial in that district or division.

* * * *

STATEMENT

Two indictments were returned against petitioner in the United States District Court for the Western District of Washington, Southern Division, the first in two counts on May 2, 1957, and the second in seven counts on August 28, 1957. Four counts (hereinafter referred to as the evasion counts) charged petitioner with wilful attempts to evade or defeat his personal income taxes for each of the years 1950 through 1953, in violation of Section 145(b) of the 1939 Code, and three (hereinafter referred to as the 990 counts) charged him with wilfully and knowingly aiding and assisting in, and counseling and procuring, the preparation and filing of false and fraudulent annual information returns (Forms 990) for the Joint Council #28 Building Association, a tax-exempt

union entity, for each of the years 1950 through 1952, in violation of Section 3793(b)(1) of the 1939 Code. The remaining two counts charged petitioner and others with conspiracy to evade and defeat the payment of petitioner's income taxes in violation of 18 U.S.C., Section 371. (R. 3-5, 435-453.)

The indictments were consolidated for trial (R. 46) but a severance was granted as to the conspiracy counts (R. 114), and subsequently the 990 count for 1951 was dismissed on the Government's motion (R. 665).

After a jury trial of fourteen weeks—from November 10, 1958 through February 19, 1959—petitioner was found guilty on the six counts tried, *i.e.*, the four evasion counts covering 1950 through 1953, and the two 990 counts covering 1950 and 1952. (R. 424, 455.) On February 27, 1959, petitioner was sentenced to imprisonment for five years and fined $10,000 on each count, plus costs, the prison sentences to run concurrently and the fines to be cumulative. (R. 427-429, 432-434.)

The court of appeals (Pet. App. "B") affirmed petitioner's conviction on the 990 counts, but, upon the suggestion of the government, reversed the conviction on the evasion counts and remanded them for retrial to resolve the issue raised by the intervening decision of this Court in *James* v. *United States*, 366 U.S. 213, *viz.*, whether petitioner had embezzled the funds involved, and hence could not be held to have *wilfully* evaded his taxes during the indictment years, or whether he had obtained the funds (or a part thereof) by means other than em-

bezzlement, in which case wilful tax evasion would be open to proof.

Although the decision of the court of appeals leaves the way open for a retrial of the evasion counts, the government will not seek to retry those offenses in the event that the sentence under the 990 counts becomes final. Several considerations enter into this decision: the imposition of a five-year sentence on the 990 counts; the trial judge's evaluation of the matter of appropriate punishment when he made the jail sentences under the various counts concurrent; the protraction of the earlier trial proceedings; the availability of witnesses in the event of retrial.

1. The pre-trial motions

While the government accepts petitioner's chronology (Pet. App. "A") of the publicity attendant upon his appearances before the Senate Select Committee on Improper Activities in the Labor or Management Field and upon the state proceedings against him for embezzlement, it offers the following summary of the salient facts in order to place the publicity issue in its proper perspective:

Petitioner's appearances before the Select Committee occurred on March 26, 1957 (Pet. App. "A" 3A-14A) and May 15, 1957 (Pet. App. "A" 21A-23A). The first indictment against petitioner was returned on May 2, 1957, two weeks prior to the running of the statute of limitations. It included one of the four evasion counts, and one of the two 990 counts, on which petitioner was ultimately convicted. (R. 3-5.)

The second indictment, which included the remaining evasion counts and the other 990 count, was returned about four months later, on August 28, 1957 (R. 435-453.) In the interim, on July 12, 1957, petitioner was indicted by a state grand jury for embezzling $1,900 from the Western Conference of Teamsters in February 1956. (Pet. App., "A" 26A.) The funds involved in the state embezzlement charge are not involved in the federal indictments.

On October 14, 1957, petitioner moved for dismissal of the federal indictments, for a six months continuance of the trial date which had been set for January 6, 1958 (R. 46, 47), and for a change of venue from the Southern Division of the Western District of Washington (which sits in Tacoma) to the Northern Division (which sits in Seattle and Bellingham) (R. 10-11, 14-15, 17). The affidavits accompanying the motions (R. 15-16, 18-44) alleged in substance that bias and prejudice existed against appellant as a result of the widely publicized investigation of the Select Committee into activities of the International Brotherhood of Teamsters and affiliated organizations of which petitioner was the immediate past president.

On October 28, 1957, after a hearing, the trial court granted the continuance, and took the other motions under advisement (R. 45-47), pending an examination *in camera* of the grand jury proceedings. On November 25, 1957, the court denied the motions to dismiss and for change of venue, noting in the order that it had examined the transcript of the grand jury proceedings, that (R. 115) "nothing appearing

therein" indicated "any irregularity in the proceedings", and that "no other basis" appeared for dismissal of either indictment or any count thereof (R. 114-115).

On January 28, 1958, petitioner moved for a further continuance of six weeks, or in the alternative, for a change of venue, because of the publicity in November and December, 1957 which attended his trial and conviction, and that of his son, on the state embezzlement charge. (R. 116-122.) The court granted the requested continuance on January 31, 1958. (R. 467.)

On April 9, 1958, petitioner renewed his motion to dismiss, and also moved for a further continuance of at least six months, or, in the alternative, for a change of venue. On this occasion, the moving papers (R. 154-168) alleged that petitioner had been prejudiced by the unfavorable publicity attendant upon his sentencing on the state embezzlement charge in February 1958, and upon the release in March 1958 by the Select Committee of two reports of its activities, both of which denounced petitioner's conduct and contained assertions that he had misappropriated union funds. After a hearing, the court granted the motion and continued the trial indefinitely. (R. 223-229.)

On August 8, 1958, petitioner again moved for a change of venue to the Northern Division but this time solely on the ground that it would be more convenient to try the case in Seattle, where petitioner and numerous witnesses resided, than in Tacoma, where the indictments were returned. (R. 232-234.)

On August 11, 1958, in the course of a hearing on this and other motions, defense counsel—after noting that the court would probably reset the case for trial in the near future—stated (R. 310) that he would "object to any trial date prior to the election" because petitioner was a subject of controversy in the election campaigns. At the same time, counsel acknowledged (R. 310) that "I don't think I would be in any position to ask for any longer continuance after [the] election, and I wouldn't do so." The court denied the motion for change of venue (R. 315-316) and set the case for trial on November 10, 1958 (R. 467), a date subsequent to the election, approximately a year and one-half after petitioner's Committee appearances, and almost nine months after petitioner's sentencing on his state embezzlement conviction.

Two subsequent motions for still further continuances, on September 23, 1958 and November 10, 1958, respectively, were similarly denied (R. 244-256, 318-335, 342-344, 351-365, Tr. 276), the trial judge acting on the second (and final) motion only after the impanelment of the jury (R. 474), at which point he made the following observation (Tr. 275):

> My honest judgment is that the jury that was impaneled yesterday, and the experience we had in the impaneling of that jury, confirmed beyond all possible doubt that in this case we have a jury without the slightest vestige of prejudice or bias, and all members unaffected in any manner by publicity or any other improper consideration. If I had the slightest doubt that this trial would not be fairly and impartially conducted or that either the Government or the de-

fendant would not have a fair, proper chance to present the case in a calm, dispassionate atmosphere, I would not hesitate to continue the trial."

2. Proceedings on impanelment of the jury

The proceedings on impanelment of the jury (R. 473-624) show that the trial judge, in conducting the voir dire examination, repeatedly questioned the prospective jurors as to possible bias or prejudice against petitioner from any cause whatsoever, including prior adverse publicity, and that he admonished the jurors finally impaneled not to discuss the case with anyone, or listen to any telecasts or broadcasts, or read any news accounts or articles relating to the case, or form any conclusions about it until they had heard all the evidence and the court's instructions on the law. (R. 476-488, 504-533, 626-631.) The jury was reminded of this admonition at every recess of the trial (see, *e.g.*, Tr. 724-726, 922, 1106-1108, 4692-4696, 5653-5654, 10527-10529) and was emphatically instructed, at the conclusion of the trial (R. 753-754), to avoid all considerations of sympathy, bias or prejudice, if any, and to decide the case solely on the evidence and the law.

Of the original panel, 29 prospective jurors were excused for undue hardship or inconvenience (R. 478-480), and 17 were excused for reasons of possible bias or prejudice for or against petitioner (R. 481-485). Of the remaining group, twelve were challenged for cause. Of these, ten were excused because

they had viewed telecasts of the Committee hearings, and one on the ground that her husband was a member of a Teamsters' local. Only one challenge for cause was denied, that relating to a juror who had read some newspaper accounts of the Committee hearings. (R. 533-534, 544, 553, 568, 574, 588, 605, 612, 621.)

The jurors who were substituted for those challenged were examined by the court on the matters and in the particulars heretofore mentioned. (See, e.g., R. 541-550.) All of the jurors finally selected had repeatedly affirmed, both by response to the court's questioning and on their oaths, that they could try the case solely on the evidence and the law as instructed by the court. (R. 481-488, 519-533, 624.)

3. The 990 counts

The following summary relates to the claim that the jury may have confused the law or the evidence pertinent to the evasion counts with that pertinent to the 990 counts, and also sets forth the proof that petitioner wilfully participated in, and was responsible for, the preparation of the false 990 returns in question:

One of these ten was the prospective juror Hamilton (see Pet. App. "A" 36A-37A) who, disregarding the court's efforts to prevent it, stated that he held an unfavorable opinion of petitioner because petitioner had invoked the Fifth Amendment at the Senate Committee hearings. As a result of this occurrence, and after excusing Hamilton, the court again admonished and examined the remaining jurors. (R. 572-576.)

(a) *Statements of counsel and instructions to the jury*

From the outset of the trial, the distinctions between the four evasion counts and the two 990 counts were repeatedly impressed upon the jury. The prosecutor, at the beginning of his opening statement, observed (R. 635) that the separate counts "fall into two categories of offenses"—the tax evasion counts, on the one hand, and the 990 counts on the other. (R. 635-636.) After separately reviewing the specific allegations contained in each of the six counts (R. 636-638), the prosecutor told the jury (R. 638-640) that it should not be confused by the similar phrasing of the separate counts within each group of offenses; that the government was required to prove each count beyond a reasonable doubt; and that the first category of offenses was distinguishable in certain important particulars from the second. The prosecutor completed his opening statement by outlining the evidence to be presented by the Government, first with respect to the evasion charges (R. 640-642), and secondly with respect to the 990 counts (R. 663-665).

Defense counsel responded by brushing aside "these less important charges" with the brief statement that petitioner was a very busy man who had to rely on others for the preparation and filing of forms, and that there was "no substance" to these "lesser charges." (R. 669-671.) The remainder of defense counsel's remarks were addressed solely to the evasion counts which he characterized (R. 671) as the "main" or "most important charges."

In their closing arguments to the jury, both prosecutor and defense counsel dealt separately with the evidence bearing on the 990 counts. (Tr. 10,651-10,653; 10,677-10,685, 10,762-10,764, 10,772-10,775, 10,797-10,801.)

Against this background the trial judge, in his instructions, repeatedly admonished the jury as to (1) the separate consideration to be accorded each count, (2) the separate elements comprising each count, and (3) the distinctions between the evasion counts and the 990 counts. (R. 703-706, 707-709, 711, 713, 723, 730-736, 748-750, 754.)

Finally, the form of the verdict submitted to the jury, and the instructions pertinent thereto, afforded further assurance that petitioner would not be prejudiced by the consolidation for trial of six separate counts covering two distinct groups of offenses. (R. 751-752.)

(b) *The evidence*

Petitioner served as president of the Joint Council 28 Building Association from 1934 to 1953. As a tax-exempt labor organization, the Association was required to file an annual information return, Form 990, with the District Director of Internal Revenue, setting forth, among other things, the Association's receipts and disbursements for the year. Form 990 returns were filed by the Association for each of the years 1941 through 1950, and for 1952 and 1953, but there was no record in the District Director's

office of a return for 1951. Although the Association's returns were customarily signed by Frank Brewster, its secretary-treasurer, the returns for 1942 and 1945 were signed by petitioner. Petitioner also customarily signed the Form 990 returns filed by the Western Conference Pension Trust Fund, another tax-exempt union entity, of which petitioner was trustee. (Tr. 333-339, 341-345, 4581, 5512-5514, 5559, 5563; Exs. 41 through 55, 55A, 712.)

The Association's 1945 return, which petitioner had signed, was false in that it reflected certain expenditures as part of the cost of property sold by the Association in that year, when in fact such amounts were payments to John Lindsay, a Seattle contractor frequently employed by the union, for work done on behalf of petitioner personally. (Tr. 9840-9846, 9977-9991, 10,171-10,174, Exs. 45, 655a, 716.)

The return for 1950 (Ex. 50) was false in that it reflected an expenditure by the Association of $16,718 for building payments and alterations, of which amount $13,590 was in fact applied by petitioner to his own use and benefit. It was further false in that it reflected an expenditure by the Association of $18,900 for new construction, of which amount $8,000 was for the personal benefit of petitioner. (Tr. 10,165-10,167.)

The return for 1952 (Ex. 51) was false in that it reflected an expenditure by the Association of $54,838 for building payments, alterations and improve-

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The count relating to 1951, as noted above, was dropped. Petitioner was convicted on the two 990 counts relating to 1950 and 1952, respectively.

ments, all of which was in fact applied by petitioner to his personal use and benefit. The 1952 return also reported that the Association had expended $15,084 for building equipment, supplies, services and repairs, of which amount $1,368 was paid to the plumbing firm for work done for petitioner personally. (Tr. 10,167-10,171.)

During the years 1950 through 1953, Lindsay received approximately $124,000 by check from the Association for work done on petitioner's personal behalf. These payments were recorded as expenses of the Association and were shown as such in the Form 990 returns prepared by Donald McDonald, the bookkeeper, for those years. (Tr. 4877, 9846-9850; Exs. 50, 51.)

Laurita T. Agapoff, who served as the Association's bookkeeper and prepared its Form 990 returns for all years prior to 1949, testified that petitioner usually told her what to record on the stubs for Association checks drawn at his request, and that, but for petitioner's instructions, she would not have known the purpose of those checks. The stubs for checks that petitioner ordered drawn upon the Association were missing, and therefore could not be presented to the witness for identification. She was able, however, to identify several stubs for checks drawn upon the Joint Council #28 Legislative Fund. Two of those stubs bore petitioner's handwriting. In 1949, when Agapoff turned the Association's books over to McDonald, her successor, she showed him the manner in which the books had been kept. (Tr. 5496-5499, 5503-5511, 5515, 5523-5527, 5537; Exs. 798, 798A.)

McDonald served as bookkeeper for the Building Association and Western Conference from 1949 through 1953. He testified (Tr. 4458) that checks issued to Lindsay were always written upon instructions received directly or indirectly from petitioner, and were never written on anyone else's instructions. McDonald received these instructions either orally from petitioner in his office or by notes which petitioner sent to him. Occasionally, petitioner would relay his instructions to McDonald through Lindsay.

In making payments to Lindsay, McDonald would customarily use checks previously signed in blank by Brewster, each of which would then be countersigned by petitioner as president. On occasions when McDonald did not have sufficient Association checks to make payments to Lindsay, or the Association's bank account was too low to cover such checks, he informed petitioner of the situation and petitioner instructed him to write the checks on the Western Conference bank account or to borrow the necessary funds from the Western Conference. (Tr. 4409-4410, 4449-4459, 4538-4546, 4554-4555, 4579-4582, 5570-5571, 5577, 5601, 5637.)

McDonald did not know, at the time he entered the checks to Lindsay as being for union construction, that a substantial number of those payments were in fact for petitioner's personal benefit. Since he knew that Lindsay was the union's general contractor, McDonald assumed that the checks were in payment of current or completed union construction work and entered them as such in the union records and on the Form 990 returns. At no time did petitioner

advise McDonald, or lead him to believe, that payments to Lindsay were for anything but union construction. (Tr. 4346-4361, 4380, 4409-4418, 4449-4461, 4564-4565, 4778-4800, 4876-4877, 5208-5291, 5305-5318, 5348-5351, 5460-5466, 5475, 5698-5702.)

Petitioner exercised direct supervision over the Association's bank account. (Tr. 4406.) McDonald prepared monthly financial statements for petitioner showing the Association's opening and closing bank balances, total receipts and disbursements during the month, and a list of receivables and payables (including outstanding checks) as of the end of the month. (Tr. 4460-4463, 4483; Exs. 804, 804-A, 804-B, 804-C.) Exhibit 805 is a worksheet showing receipts and disbursements of Joint Counsel =28 for the period May 1, 1950 to October, 1951. It bears pencil notations in petitioner's handwriting.

McDonald delivered to petitioner's office for signature the original and carbon copies of the 1951 Form 990 returns for both the Association and the Western Conference Pension Trust Fund. He departed from the usual practice of submitting the Association's return to Brewster because the payments by the Association to Lindsay during 1951 had been higher than for the previous year, the instructions for such payments had come from petitioner, and McDonald was uncertain whether he had correctly recorded them. The return for the Pension Trust (Ex. 55) was signed by petitioner on May 15, 1952, and was thereafter filed with the district director, but the return for the Association was never filed. McDonald did not see that return again, and never received

back from petitioner the office copy of the return. (Tr. 341-345, 4575.)

ARGUMENT

A. There is no sound basis for challenging the district court's considered exercise of its discretion in disposing of petitioner's various motions based upon claim of prejudice. The nub of petitioner's argument is that there was strong community prejudice against him created by adverse publicity, that the grand and petit juries were composed of persons who "must necessarily have been biased" and that there was an added element of unfairness because many of the attacks upon him stemmed, directly or indirectly, from an activity of the United States, *i.e.*, the investigations of the Senate Committee. Adverse publicity, whatever its source, does not confer an immunity from prosecution for crime. If the rule were otherwise, the final say as to prosecution might be with the news media rather than with those charged with the responsibility for law enforcement. A person suspected of crime is entitled to a fair trial before an impartial jury of his peers. The trial court took every proper precaution to assure petitioner a fair trial. No more was required.

1. The trial court first took steps to eliminate the danger of prejudice by granting every request for a continuance. We fully accept the proposition, stated in *Delaney* v. *United States*, 199 F 2d 107 (C.A. 1), that it may be necessary to postpone a trial until the danger of "prejudice may reasonably be thought to have been substantially removed." The trial court

scrupulously followed this precept by granting three successive continuances which effectively postponed the trial date to 18 months after the first indictment, 15 months after the second indictment, and 9 months after petitioner's sentencing on the state embezzlement charge. By November 10, 1958, when the trial in fact commenced, the adverse publicity directly involving petitioner had abated, and the proceedings on impanelment of the jury (which, the court of appeals observed, were conducted by the trial judge "in an able and admirable fashion" (Pet. App. "B" 8B)) served further to assure that petitioner would receive a fair trial by an impartial jury. Indeed, by August 1958, three months prior to the trial, the state of the matter was such that petitioner's counsel felt secure in advising the court (R. 310) that "I don't think I would be in any position to ask for any longer continuance [than until] after [the] election" in November. Moreover, the motion for change of venue made at that time was expressly grounded upon reasons of convenience, rather than possible prejudice resulting from continuing publicity. In the circumstances, there is no basis for concluding that the trial judge abused his discretion in denying petitioner's motions for a further continuance or change of venue. Compare *Stroble* v. *California*, 343 U.S. 181, 193 and *Irvin* v. *Dowd*, 366 U.S. 717, 722-723 with *Delaney* v. *United States*, 199 F. 2d 107 (C.A. 1) on which petitioner relies. (Pet. 23-24.)

2. The trial court also took every proper precaution during the impanelment of the jury and, again, in instructing the jurors during the trial. Seventeen

prospective jurors were excused because of possible bias or prejudice against petitioners. Ten more were excused because they had viewed telecasts or the Senate Committee hearings. Only one challenge for cause was denied—a juror who had read some newspaper accounts of the Committee hearings. The prospective jurors were carefully questioned about all these matters. All of the jurors selected repeatedly affirmed, by answer to the court's questions and on their oaths, that they could try the case solely on the evidence and instructions by the court. Before every recess of the trial the jury was admonished not to discuss the case with anyone or listen to any telecasts or broadcasts or read any news accounts concerning it. At the conclusion the jurors were emphatically told to avoid all sympathy, bias or prejudice, and decide the case solely on the evidence and applicable law. (See Statement pp. 11-12 *supra*).

3. Petitioner's challenge to the grand jury is without merit. We are aware of no authority, and petitioner cites none, to support the proposition that an indictment is open to attack on the ground that the grand jurors were exposed to a flow of publicity unfavorable to the defendant. Such a proposition runs counter to the principle, firmly embedded in history, that the grand jury, as an investigatory and accusatory body, must have the widest scope. *Costello* v. *United States*, 350 U.S. 359, 362; *United States* v. *Johnson*, 319 U.S. 503, 510; *In re April 1956 Term Grand Jury*, 239 F. 2d 263, 268 (C.A. 7th); *United States* v. *Knowles*, 147 F. Supp. 19 (D.C. D.C.), *United States* v. *Smyth*, 104 F. Supp. 283 (N.D. Cal.); *In re Kittle*,

180 Fed. 946, 947 (S.D. N.Y.). The case of *United States* v. *Nunan*, 236 F. 2d 576, 592-593 (C.A. 2d), certiorari denied, 353 U.S. 912, provides explicit support for the trial court's refusal to quash the indictments on grounds of prejudicial publicity, as does the "general rule" stated in 4 Wharton's *Criminal Procedure*, § 1692, p. 434 (1957) that "bias or prejudice on the part of one summoned as a grand juror * * * does not disqualify him from serving on the grand jury or render invalid indictments returned by it." To similar effect, see *United States* v. *Rintelen*, 235 Fed. 787, 789 (S.D. N.Y.). To apply to grand jury proceedings the prophylactic rules which have evolved in the context of trial on the merits would, we submit, seriously impair and disrupt the administration of criminal law.

The cases relied on by petitioner (Pet. 19-23) are clearly distinguishable in that they concern judicial enforcement of recognized constitutional guaranties—viz., the right to trial by an unbiased petit jury (*Irvin* v. *Dowd*, 366 U.S. 717; *Marshall* v. *United States*, 360 U.S. 310; *Delaney* v. *United States*, 199 F. 2d 107 (C.A. 1)) and the bar against discriminatory action by a State in systematically excluding a particular class of citizens from grand jury service (*Hernandez* v. *Texas*, 347 U.S. 475; *Cassell* v. *Texas*, 339 U.S. 282; *Pierre* v. *Louisiana*, 306 U.S. 354).[4] None

[4] There is no claim in this case, nor does there exist any basis for claiming, that petitioner was in any way discriminated against or denied the equal protection of the laws in the impanelment or proceedings of the federal grand jury. Cf. the dissenting opinion of Mr. Justice Black in *Beck* v. *Washington*, No. 40, this Term, May 14, 1962.

of the cases cited establish a right to a grand jury free from possible influence by unfavorable publicity.

We point out additionally, as the court of appeals observed (Pet. App. "B" 7B) that "there was no evidence that in fact the grand jury was prejudiced or that any member thereof had been affected by the vast amount of publicity accorded Beck." Indeed, petitioner makes no claim of personal bias or malice on the part of any grand juror (c.f., *Castle* v. *United States*, 238 F. 2d 131, 135 (C.A. 8th)), and the trial judge specifically ruled, after an *in camera* examination of the grand jury minutes, that no irregularity or other basis appeared in the proceedings to warrant dismissal of the indictments.

B. Petitioner, in challenging the evidence supporting his conviction on the 990 counts, rests heavily upon the point that he did not sign the returns and asserts that the government only showed "a possible motive and opportunity." The charge, of course, is not that petitioner signed the false returns, but that he knowingly caused the fraudulent filings by means of the control and direction which he exercised over his aides. The evidence, we submit, fully warranted the jury in drawing this inference.

Petitioner had first-hand knowledge of Association's obligation to file annual information returns. All checks written to Lindsay were issued on petitioner's instructions and signed by him. These payments were entered on the Association's books and on the returns as legitimate union expenses, when in fact a substantial portion thereof was applied by petitioner to his own benefit. Petitioner concealed the

true purpose of these expenditures from the Association's bookkeepers who, in the absence of contrary information, assumed that the payments were for work done by Lindsay for the union. It also appears that petitioner, although he was undoubtedly a busy man, was not too busy to supervise the detailed financial operations of the Association, particularly as they affected the augmentation of his personal fortune. The evidence fully justifies the conclusion that petitioner not only wilfully participated in, but indeed was exclusively responsible for, the preparation of false 990 returns for the Association in 1950 and 1952. For a similar case under Section 3793(b)(1), sustaining the conviction of a corporate officer who, through his instructions to the bookkeepers, knowingly caused them to make improper entries on the books, resulting in false corporate income tax returns, see *United States* v. *Brill*, 270 F. 2d 525 (C.A. 3d).

The substantial evidence of guilt reviewed above, coupled with the repeated efforts of both counsel and court to assure separate consideration of the evidence bearing on each count and each group of offenses, fully answers petitioner's assertion (Pet. 28) that he was prejudiced by the jury's simultaneous consideration of the 990 counts and the evasion counts.[5] "Unless

[5] It is obviously no defense to a prosecution under Section 3793(b)(1) for assisting in the preparation of false returns on behalf of a tax exempt organization to show that the accused could not have intended to evade his personal income taxes under Section 145(b) with respect to the amounts misrepresented. Hence, the decision in *James* v. *United States*, 366 U.S. 213, has no legal effect as regards petitioner's criminal liability on the 990 counts.

we proceed on the basis that the jury will follow the court's instructions where those instructions are clear and the circumstances are such that the jury can reasonably be expected to follow them, the jury system makes little sense. Based on faith that the jury will endeavor to follow the court's instructions, our system of jury trial has produced one of the most valuable and practical mechanisms in human experience for dispensing substantial justice." *Delli Paoli* v. *United States*, 352 U.S. 232, 242.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

LOUIS F. OBERDORFER,
Assistant Attorney General.

JOSEPH M. HOWARD,
BURT J. ABRAMS,
Attorneys.

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In the Supreme Court of the United States

October Term, 1961

DAVID D. BECK, *Petitioner*

vs.

UNITED STATES OF AMERICA

SUPPLEMENT TO PETITION FOR CERTIORARI AND REPLY TO BRIEF IN OPPOSITION.

CHARLES S. BURDELL
WILLIAM L. DWYER
Counsel for Petitioner
929 Logan Building
Seattle 1, Washington

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CHARLES S. BURDELL
WILLIAM L. DWYER
Counsel for Petitioner
929 Logan Building
Seattle 1, Washington

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SUPPLEMENT TO PETITION FOR CERTIORARI AND REPLY TO BRIEF IN OPPOSITION.

This Supplement to the Petition for Certiorari is filed pursuant to Rule 24 (4) of the Rules of this Court.

Its purpose is to discuss briefly two cases which have been decided by this Court since the date of filing the Petition herein. The cases are *Beck v. Washington* and *Hutcheson v. United States,* both decided on May 14, 1962. (October Term, 1961, No. 40 and No. 46).

While preparing this Supplement, Counsel received the Brief of the United States in Opposition to the Petition. A Reply to this Brief will be included herein.

SUPPLEMENT TO PETITION

The basic and significant distinction between *Beck v. Washington* and the present case is this:

Beck v. Washington related to the impact of FEDERAL legislative proceedings upon STATE judicial proceedings.

But the present case relates to the impact of FEDERAL legislative proceedings upon FEDERAL judicial proceedings.

In *Beck v. Washington,* the scope of review was limited to a determination of whether the proceedings of the State court conformed to standards imposed by the Fourteenth Amendment. But in the present case Federal judicial proceedings are involved and the required standards are on a higher plane. The scope of review and the standards applicable in this case are defined in *McNabb v. United States*, 318 U.S. 332 (1943) as follows (p. 340):

> "In the view we take of the case, however, it becomes unnecessary to reach the constitutional issue pressed upon us. For, while the power of this court to undue convictions in state courts is limited to the enforcement of those 'fundamental principals of liberty and justice,' Hebert vs. Louisiana, 272 U.S. 312, 316, 71 Law. Ed. 270, 272, 47 Supreme Court 103, 48 A.L.R. 1102, which are secured by the Fourteenth Amendment, the scope of our reviewing power over convictions brought here from the Federal courts is not confined to ascertainment of constitutional validity. Judicial supervision of the administration of criminal justice in the Federal courts implies the duties of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as 'due process of law' and below which we reach what is really trial by force. Moreover, review by this court of State action expressing its notion of what

will best further its own security in the administration of criminal justice demands appropriate respect for the deliberative judgment of a State in so basic an exercise of its jurisdiction. Considerations of large policy in making the necessary accommodations in our Federal system are wholly irrelevant to the formulation and application of proper standards for the enforcement of the Federal criminal law in the Federal courts." See also, *Gruenwald v. United States*, 353 U.S. 391, 424 (1957).

It may be that when Federal proceedings threaten to affect State proceedings, the citizen must accept the situation as merely a stroke of hard luck. See *Hale v. Henkel*, 201 U.S. 43 (1906). But there is no justification for the application of this view where the Legislative Branch of the United States deliberately sets out to prejudice and degrade a citizen against whom criminal proceedings are simultaneously being conducted within the Judicial Branch of the United States.

We do not contend that the United States is *ipso facto* barred from conducting simultaneous legislative and judicial proceedings against a citizen. Our contention is that the urgency and nature of the legislative proceedings must be measured against the requirement that fair judicial proceedings be preserved, and that both the Legislative and Judicial Branches of the United States must conduct their proceedings by methods designed, insofar as possible, to preserve fundamental principles of justice.

That was not done in the present case. The legislative inquiry went far beyond the scope necessary for the proposal and enactment of legislation; and the inquiry was conducted publicly (a) while Petitioner was the subject of a grand jury investiga-

tion; (b) after the return of an Indictment; (c) while a second charge against the petitioner was being considered by a grand jury; (d) after the return of a second Indictment and prior to trial. (A chronology of these events and the facts summarized hereinafter is set forth in detail in the Appendix to the Petition, commencing at Page 1A).

At the time of petitioner's first appearance before the Senate Committee, the Committee was advised that he was the subject of a criminal investigation. His assertions of privilege under the Fifth Amendment were not honored. Instead, he was required repeatedly to assert the privilege and to absorb the public contempt for doing so; and, indeed, his right to assert the privilege was publicly challenged and criticized by the Senate Committee. At the time of his second appearance before the Committee, the Committee was advised that he had been indicted and a request was made that his testimony be postponed. This request was denied and petitioner was again required repeatedly to assert the privilege of the Fifth Amendment and was publicly accused by the Committee of theft and other misconduct. Thereafter the second Indictment was returned by the grand jury. Subsequently the Committee issued a report which included "Findings" that petitioner was guilty of theft and other misconduct. The Chairman of the Committee also summarized these "Findings" in a magazine article with widespread national circulation.

It was the theory of the government that most, if not all, of petitioner's unreported income consisted of funds acquired by theft. (See Government Brief, Court of Appeals, p. 27-62). The inquiry of the Senate Committee was precisely related to the sub-

ject of the indictments and the trial testimony. Of the eleven "Findings" of the Senate Committee, at least nine were the subjects of testimony at the trial; and witnesses (at least 12) who testified before the Committee were called to repeat portions of their testimony at the trial; and many exhibits introduced "in evidence" in the Committee proceedings were also admitted in evidence at the trial. (The "Findings" of the Committee are at Page 84-86 of Senate Report No. 1417. A list of some of the witnesses before the committee is set forth in Parts 3, 4, 7 and 10 of the Committee Hearings. A list of the witnesses at the trial is set forth in Appendix C of Appelant's opening Brief in the Court of Appeals. Further details which demonstrate the similarity between the Hearings and the trial, both as to subject matter and evidence, are set forth hereinafter at page 12-13).

While the legislative inquiry was being conducted in high fury, the grand jury proceedings continued without inquiry as to whether its members were affected by the unprecedented hostile publicity and without cautionary instructions or advice from the Court. (See Appelant's Brief in the Court of Appeals, Page 50-53).

Against this background it is hardly surprising that the grand jury indicted petitioner on a charge of filing a false 990 Return for a year in which no such Return was even filed! The charge was, of course, dismissed at the commencement of the trial. (See Transcript of Testimony, Page 4574). Nor is it surprising, under the circumstances, that the trial jury convicted petitioner on two charges relating to 990 Returns despite the fact that petitioner had nothing whatsoever to do with preparing or filing

the Returns. (The failure of proof on the 990 Counts is discussed briefly at p. 17 hereinafter).

By its holding in *Beck v. Washington* this Court has now established that one accused in state proceedings must bear the risk that the federal government may engage in conduct which endangers the fairness of the state proceedings. In assuming this risk, and to guard against this danger, the accused must be prepared to prove as a "demonstrable reality" that the federal proceedings have in fact affected the state proceedings.

The Court of Appeals in the present case also adopted the same theory, declaring that the burden was upon the accused to make "a specific showing of prejudice . . ." (298 F. 2d 622, 627).[1]

There is no justification for the adoption of this rule in the present case. To require one accused by our government to bear the risk that the *same* government, in non-judicial proceedings, will intentionally endanger his right to fair procedures would violate the most minimal standards of due process and procedural fairness as well as the basic philosophy of separation of powers. Where, as here, our government, acting through the Senate, deliberately attacks a citizen against whom criminal proceedings are pending, and carries on its attack in a manner calculated to endanger the fairness of the proceedings, it is not asking too much to require the government to assume the burden of proving that the rights of the accused have not been prejudiced.

In cases involving a lesser degree of potential prejudice than that which is manifest in the present

[1] This rule is in conflict with the decision of the Court of Appeals for the First Circuit in *Delaney v. United States*, 199 F. 2d 107.

case, this Court and other Federal Courts have not required the accused to assume the burden of demonstrating bias on the part of the jurors. Whatever the State rule is to be, the Federal Courts have repeatedly held that no specific or direct showing of jury prejudice is required where the surrounding circumstances so clearly demonstrate a danger of prejudice. See *Marshall v. United States*, 360 U.S. 310 (1960); *Griffin v. United States*, 295 Fed. 437 (3rd. Cir. 1924); *United States v. Marrin*, 159 Fed. 767 (D.C. Penn. 1908). *To deny the application of these decisions to a case in which the danger is created by the United States itself would be to abandon all justice.*

Most of the cases on this subject relate to the possible effect of hostile publicity upon the minds of *trial jurors*. The rule can be no different in a case involving *grand jurors*. Whatever may be the rule in state procedure, the federal rule is that the citizen is entitled to a fair and unbiased grand jury, or at least a grand jury which has not been subjected to prejudicial influences created by the government. *Hoffman v. United States*, 341 U.S. 479, 489 (1951); *Costello v. United States*, 350 U.S. 359, 369 (1956). Petitioner's contention is that the United States should not be permitted to create potential prejudice and then subject an accused to the burden of demonstrating actual prejudice, while preventing the accused from doing so by resort to procedural rules which deny to the accused any opportunity to sustain this burden. Petitioner was not present at the impanelment of the Grand Jury. (Cf. Rule 6(b), which provides that a defendant who has been held to answer may challenge grand jurors.) Petitioner's motion for production of the

Grand Jury transcript was denied (R. 845) An *in camera* examination of the transcript by a trial court does not provide a method for measuring the prejudice of grand jurors. Among other deficiencies in this procedure, it denies the accused the benefit of counsel with respect to a vital procedural step.

In the case of *United States v. Carper*, 116 Fed. Sup. 817 (Dist. Col. 1941) this problem was carefully considered. In that case the court dismissed an indictment on the ground that unauthorized persons had appeared before the grand jury, even though no prejudice was shown, and held at p. 820:

> "Secondly, in many cases the defendant would have an almost impossible task trying to prove actual prejudice to himself. It seems to this court that at most the defendant need show only probable prejudice to the grand jury system by this violation."

The same rule was followed by the First Circuit in *Delaney v. United States*, 199 Fed. (2d) 107, where a new trial was granted because of hostile publicity engendered by a congressional committee. The defendant there made no "specific showing of prejudice", and undoubtedly could not have done so. The *Delaney case* involved only a trial jury issue and not a grand jury issue, but the present case involves both. In all other respects the two cases are closely similar, and the decisions of the two courts of appeal are in direct conflict.

It is submitted that the crucial question in the present case comes to this: When criminal proceedings brought by the United States are pending against a citizen, and where such proceedings include secret grand jury sessions and secret deliberations on the part of jurors whose subconscious influences cannot be measured, and when the United States simultaneously denounces and

asserts the guilt of that citizen in public congressional proceedings, which party should bear the risk of the damage necessarily inflicted upon the Federal judicial system? It is submitted that this question is of great importance and fully justifies the granting of certiorari herein.

Hutcheson v. United States also involves the conflict between legislative investigations and criminal prosecutions. In that case, however, Hutcheson contended that the inquiry by the Senate Committee was *per se* unconstitutional and, therefore, could not sustain a conviction for refusing to answer. The Court did not consider whether the interrogation of Hutcheson had affected proceedings in an Indiana prosecution of Hutcheson, since that case was not before the Court.

The principles announced in the various opinions in *Hutcheson* demonstrate the compelling need for certiorari in the present case. Here, a large portion of the Senate hearings were, in fact, a preview of the trial. The Senate Committee did not "honor" petitioner's assertion of his constitutional privilege, but instead challenged his right to assert it and condemned him for doing so. In this case the inquiry of petitioner by the Senate was concurrent with the grand jury Indictments.

In the present case the Senate did not accommodate the public interest in legitimate legislative inquiry with the public interest in securing a fair trial. And any fair examination of the Senate proceedings will forcefully demonstrate that a primary purpose of the Committee was to aid in the prosecution and conviction of the petitioner.[2]

[2] The Trial Court denied petitioner's motion for the right to interrogate the Chairman and Counsel of the Senate Committee. R.291.

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

The Brief of the United States in opposition to the Petition will be referred to herein by the abbreviation "Br. Op."

1) The government states that it will not seek to retry the evasion counts "in the event that the sentence under the 990 counts becomes final." (Br. Op. p. 7) (The government makes no offer to dismiss the conspiracy charge against petitioner. R. 440, 447). Whatever may be the reason for this offer, it certainly provides no grounds for denying the Petition herein.

2) The government states that on April 9, 1958 the Court granted a continuance at the request of petitioner (Br. Op. p. 9). It should be added that on the same date, the government also sought a continuance. This was shortly after the issuance of the Interim Report of the Senate Committee (Report No. 1417)[1] and petitioner frankly stated to the Court that his motion for continuance was based upon the issuance of this report and the attendant

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Query whether this decision is binding upon the Attorney General or upon a subsequent Attorney General. One reason for the decision against retrial may be that the government, having determined to convict petitioner for embezzlement, will be unable tactically in a subsequent trial to take the position that the unreported funds were considered by petitioner and by the union entities to be compensation for services.

[1] One of the "Findings" in the Senate Report was: "Dave Beck took, not borrowed, more than $370,000 in union funds from the Western Conference of Teamsters, Joint Council No. 28 Building Fund and the Public Relations Division of Joint Council No. 2." The three entities referred to in this "Finding" were the principal sources of petitioner's alleged unreported income and there was considerable testimony to the effect that the sum which petitioner owed to the union entities was exactly $370,000.

publicity (R. 224-225). The Court acknowledged that there had been publicity concerning this subject. Thus (R. 224-225):

> "*Mr. Burdell*: My position, as the Court, I believe, knows, is that under the present circumstances it is extremely unlikely and probably extremely difficult, regardless of the attempts of the Court, to obtain a fair and impartial jury in view of the circumstances that are even going on at the present time in the East, and particularly in view of some recent interim reports which have been issued by the Senate Committee and which have received rather prominent publicity throughout the area both by way of newspapers and television reports.
>
> In addition to that, I filed a motion this morning. . . .
>
> *The Court*: In that connection you are referring to, I take it, the material shown in the attachments to your motion pertaining to the interim report of the Senate so-called Rackets Committee?
>
> *Mr. Burdell*: Yes, I am.
>
> *The Court*: And the attendant publicity during the last several weeks?"

The reason given by the government for seeking the continuance was that the issue of taxability of embezzled funds created a substantial legal question "that might be brought to the attention of the Court in advance of trial for the purpose of expediting the trial proceeding"! (R. 226) A few days earlier the Government had *resisted* an attempt by petitioner to raise this legal question (R. 203, 208-09). Of course the Government never made any attempt whatsoever to expedite the trial by attempting to solve this problem prior to the trial or by attempting, at the trial, to draw any dis-

tinction between funds which were allegedly embezzled and other funds which the petitioner had received.

In addition to the motion for continuance, petitioner also filed, on August 8, 1958, a motion for permission to interrogate, either orally or upon written interrogatories, the Chairman, Chief Counsel and Clerk of the United States Senate Committee. (R. 325) In seeking to do so, petitioner filed an affidavit giving the following reasons for the motion (R. 236-38):

"That defendant has requested a pre-trial hearing upon said challenge and motion for the purpose of presenting testimony and evidence to establish the foregoing facts, and to establish particularly that the aforesaid atmosphere of hostility against him was created and has been maintained by the said Committee willfully and with full knowledge that the indictments herein were pending or had been returned. Defendant proposes to establish further that in conducting its public hearings before, during and after the sessions of the said grand juries, the said Committee relied upon and revealed evidence which had been gathered over a period of years by the Internal Revenue Service in preparation for the commencement of the prosecution herein; that the witnesses called by said Committee to testify at public hearings which were nationally televised and widely publicized by every other means of mass communication, were substantially the same witnesses who subsequently appeared before the said grand juries and who will be called by the plaintiff to testify at the trial herein; that the said Committee and its representatives have concluded and repeatedly announced, orally and in

writing, that defendant, during the years covered by the indictments herein, misappropriated at least $370,000.00 of the funds of labor organizations of which he was an official, and that the funds so described are the same funds which go to make up substantially all of the government's net worth evidence herein; that on at least one occasion the Chairman or Chief Counsel of said Committee has attempted to influence the decisions of this court by transmitting a telegram concerning this defendant to the Judge thereof; and that prior to the commencement of the said Senate hearings, and before each of this defendant's two appearances as a witness before the Committee, the Committee received notice from this defendant and his said counsel that the grand jury proceedings herein were pending, that the monies involved in the Committee's inquiry were the same that would be involved in any income tax prosecution, and that the Committee hearings should be suspended until the trial of these cases, and that if they were not so suspended, defendant would be required to claim his privilege against self-incrimination as to any question relevant to the issues raised by the indictment herein.

That at the present time, and continuously for the past several months, the said Committee is conducting and has conducted a continuing series of public hearings concerning the financial affairs and other activities of the International Brotherhood of Teamsters and of its affiliated unions, and of James R. Hoffa, its president; that said hearings are highly publicized and of an inflammatory nature, and are prejudicial to this defendant who, in the public mind, is allied closely with the said unions and with the said James R. Hoffa. Affiant

is informed and believes, and therefore avers, that said Committee will continue to hold such hearings until and during the trial of these cases if trial is begun in October, 1958."

The aforesaid affidavit was uncontroverted, but the motion was denied (R. 313).

4) In its consideration of the proceedings at which the trial jury was selected, the Government refers to the fact that prospective juror Hamilton stated that he held an unfavorable opinion of petitioner because the latter had invoked the Fifth Amendment at the Senate Committee hearings. (Br. Op. p. 12) It has been Petitioner's position that this incident demonstrates that the conduct of the Senate Committee in requiring petitioner to assert the privilege of the Fifth Amendment was still in the minds of some of the prospective jurors; but if each of them had perchance forgotten this course of conduct, it was brought to their attention by the statements of prospective juror Hamilton. Moreover, this is not a case where, as in *Grunewald v. United States*, 353 U.S. 391 (1957) the defendant was shown to have asserted the privilege only once. In view of the fact that the Senate Committee required petitioner to repeatedly assert the Fifth Amendment to such an extent that the number of times he did so became a subject of comment and newspaper headlines (see, for example, p. 24A of the Appendix to the Petition herein), the only reasonable conclusion is that the Hamilton incident reminded the jurors that petitioner had asserted the privilege many times. The government apparently attaches significance to the fact that the

Trial Court admonished the jurors in this incident. But in *Beck v. Washington,* the Court observed that an admonition concerning the effect of the privilege "might well have added fuel to the flames . . ." (Slip Op. p. 7). Here, as in *Grunewald* (353 U.S. 424)

> ". . . the danger that the jury made impermissible use of [the statement concerning Petitioner's assertion of the privilege] by implicitly equating the plea of the Fifth Amendment with guilt is, in light of contemporary history, far from negligible. Weighing these factors, therefore, we feel that we should draw upon our supervisory power over the administration of federal criminal justice in order to rule on the matter. Cr. *McNabb v. United States,* 318 U.S. 332, 87 L. ed. 819, 63 S. Ct. 608."

5) *The Grand Jury Issue.* The position of the government on this vital issue is that it knows of no authority to support the argument that an indictment is subject to attack because "the grand jurors were exposed to a flow of publicity, unfavorable to the defendant." (Br. Op. p. 21) This ignores the vital and significant fact that the unfavorable publicity was created by the same sover-

Immediately following the outburst of prospective juror Hamilton, petitioner moved for a mistrial as follows:

> "I want to move at this time for a mistrial on the ground that this last juror, Mr. Hamilton . . . stated in the presence of the other jurors that he had formed an unfavorable impression of Mr. Beck because of Mr. Beck's exercise of Mr. Beck's privilege under the Fifth Amendment in the course of the Congressional hearings. . . . It suggests to the other jurors that there was something wrong with asserting that privilege, and it is particularly significant in this case, because Mr. Hamilton is a retired Brigadier-General and Chairman of the Republican Party, and apparently a man of some stature. On that ground we move for a mistrial."

This motion was denied by the Court (R. 575).

eign which had petitioner under investigation and indictment. A grand jury in our country will never be a shield between the prosecutor and the accused (*Hoffman v. United States;* 341 U.S. 479, 485) if the government itself may intentionally make the citizen the target of accusations relating to the specific acts which a grand jury is simultaneously considering.

It is also asserted that the "prophylactic rules" of trial proceedings are inapplicable to grand jury proceedings and that the racial exclusion cases are inapplicable (Br. Op. p. 22). If this means that a citizen is not entitled to a fair and impartial grand jury, the argument is in conflict with previous decisions of this Court. Even if we assume that the rules relating to trial juries do not apply to grand juries, it does not follow that the government can take affirmative and positive steps calculated to interfere with the impartial deliberations of grand juries. On the contrary, since grand juries are secret and afford an accused little or no opportunity for considering the procedures and submitting them to the courts for review, it should be the duty of the government, and all branches thereof, to carefully avoid all possibility of interference with the grand jury function.

As to the racial exclusion cases—whatever may be the rationale of these cases—the fundamental objective is to provide fair and impartial procedures during a criminal investigation at the grand jury level. That is all that is sought in the present case.

The government adopts the position taken by the Court of Appeals, that the accused must make a "specific showing of prejudice . . . to make erroneous the action of the trial judge in refusing to dis-

miss the indictment." (298 F(2d) 622, 627; Br. Op. p. 23). Here, we think, the government comes to grips with the fundamental problem involved in this case. Who must bear the risk of prejudice, and the burden of demonstrating such prejudice, when the danger is created by the government itself? It is our position that the burden in this narrow type of case should not be upon the accused or, if it is upon the accused, that it has been fully satisfied by the showing of intentional conduct and resultant publicity which took place in this case. Decisions and arguments which relate to accidental publicity do not control the peculiar problem presented here.

6) *The 990 Counts.* It is not the function of this Court to weigh evidence. But we are convinced that any fair appraisal of the evidence in this case will show conclusively that there was no evidence whatsoever of any act on the part of petitioner relating in any way to the preparation or filing of the 1950 and 1952-990 returns, and that the verdict of the jury resulted solely from the background of hostile publicity created by the Senate Committee and from the fact that the government was determined to prove that petitioner was guilty of embezzlement as well as tax evasion. Under these circumstances, this Court will act. *Thompson v. Louisville,* 362 U.S. 199 (1960).

In its brief in the Court of Appeals (p. 178-185) the government failed to refer the Court or counsel to any page of the record, or to any exhibit, which was claimed to support the verdict on the 990 counts. This fact was brought to the attention of the government in petitioner's reply brief (p. 40). Nevertheless, in the supplemental briefs which were filed subsequent to the decision in *James v. United*

States, 366 U.S. 213, the government again failed to designate any testimony or exhibits in support of petitioner's conviction (and sentence of conviction for five years) on the 990 counts. Finally, in its brief in opposition to the petition herein, the government does refer to some testimony and exhibits, but a fair analysis of all of the evidence referred to by the government forcefully demonstrates that there was really no evidence in support of these counts and that it would be a frightful violation of due process for this Court to permit these convictions to stand, whether or not the government decides to retry the tax evasion counts.

We have been unable to find any decision which could conceivably be cited as authority for affirmance of these counts. The case of *United States v. Brill*, 270 F.(2d) 525 (3rd Cir. 1959) provides not the slightest assistance to the government. The case which is most similar to the facts involved in the present case is *United States v. Pechenik*, 236 F.(2d) 844 (3rd Cir. 1956) where a conviction was reversed.

The 990 returns were prepared by Donald M. McDonald and were delivered by him to Frank Brewster and signed only by Brewster (Tr. 4591, 4762). McDonald, a government witness, testified flatly that petitioner did not have anything to do with preparing or signing either of these returns (Tr. 4828). The government's attempt to torture other testimony and evidence into some sort of a circumstantial case against petitioner is based purely upon assumption and speculation.

The falsity of the 990 counts lay in the fact that checks written on the account of Joint Council No. 28 Building Association, payable to John Lindsay,

a contractor, were all treated by McDonald as Building Association expenses. Some of the checks were in fact payments to Lindsay for construction work done for petitioner, rather than for the Building Association. This was a large portion of the money which the government claimed to have been embezzled, and which petitioner's counsel claimed to have been borrowed, and which, according to the Court of Appeals, may have been compensation for services (295 F(2d) 630).

Since the returns were prepared by McDonald and signed by Brewster, the question becomes: did petitioner do *anything* to cause McDonald to make the improper entries on the returns?

The appropriate starting point in making this inquiry is to be found in the government's brief. The government asserts (Br. Op. p. 17):

> "McDonald did not know, at the time he entered the checks to Lindsay as being for union construction, that a substantial number of these payments were in fact for petitioner's personal benefit. Since he knew that Lindsay was the union's general contractor, *McDonald assumed that the checks were in payment of current or completed union construction work and entered them as such in the union records and on the Form 990 returns.*" (Emphasis supplied)

The government then says that petitioner did not advise McDonald that the payments to Lindsay were for anything other than union construction (Br. Op. p. 18).

The unfairness of this argument can be readily demonstrated:

(a) McDonald *did know* that Lindsay was performing construction work both for petitioner per-

sonally and for the Building Association (Tr. 4780-81, 4783-84).

(b) Petitioner was not McDonald's superior and did not supervise his work (Tr. 4531, 4484, 4746, 5093; 4372-4373, 4409-4410).

(c) McDonald *never* asked petitioner any questions about how to prepare the returns (Tr. 5369).

(d) Petitioner never saw the books of the Building Association and had no knowledge concerning the method used by McDonald in entering the payments to Lindsay (Tr. 4745).

(e) Petitioner never told McDonald how to keep the books of the Building Association (Tr. 4745) and McDonald sought no instructions (Tr. 4356, 4360, 4372-4373, 4409-4410).

(f) McDonald *never* made any inquiry of petitioner with respect to the payments to Lindsay (Tr. 4782-4790).

(g) McDonald obtained his information concerning Lindsay's charges and the work which Lindsay was performing from Lindsay himself. (Tr. 4556-4558, 4564, 4585).

(h) Lindsay segregated the costs for the work he did for petitioner from that which he did for the Building Association, and petitioner depended upon Lindsay to accurately separate these costs (Tr. 5369-5371, 5458-60).

(i) Petitioner never gave Lindsay instructions to keep incorrect or improper records (Tr. 5369).

(j) Petitioner never gave Lindsay instructions to charge personal construction costs to the Building Association (Tr. 5369).

(k) Petitioner never gave Lindsay instructions

to keep incorrect accounts or records (Tr. 5369).

(l) There is not the slightest evidence that the 1950 or 1952 return came to the attention of the petitioner, either physically or mentally.

(m) Although from time to time, petitioner as well as others, did give McDonald instructions to write checks to Lindsay, there is no evidence indicating which checks were written at the instructions of petitioner, or during what year they were written, or what construction work they related to, or whether these particular checks were improperly entered by McDonald on the 990 returns.

(n) Knowing that proper records were being kept, appellant, had he desired or attempted to falsify, would have had to instruct someone to conceal or change or falsify these records. There is not one word of testimony that he did so.

From the above testimony, which was explicit and uncontradicted, it is clear that petitioner had no reason to know that McDonald prepared either the 1950 or 1952 returns incorrectly. On the contrary, knowing that McDonald was obtaining his information from Lindsay and that Lindsay was keeping proper records, petitioner would have concluded (assuming the question occurred to him) that McDonald and Lindsay were handling the matter correctly. Under these circumstances, how can the government ask any court to permit a conviction to stand because petitioner did not "advise McDonald, or lead him to believe, that payments to Lindsay were for anything but union construction." (Br. Op. p. 18)

The other contentions made by the government are equally unsound, and in most cases based upon

an inaccurate interpretation of the testimony.* Thus:

(a) The government's assertion that checks issued to Lindsay were written upon instructions received "directly or indirectly" (Br. Op. p. 17) is meaningless. The fact is that McDonald wrote checks to Lindsay upon the instructions of at least six persons, including Lindsay himself, and various superiors of McDonald (Tr. 4755, 4782, 4570). There is no testimony that petitioner gave any instructions to these other people concerning the instructions which they in turn were to give McDonald, or concerning the manner in which the checks were to be entered on the books of the Building Association.

(b) The fact that petitioner gave McDonald instructions concerning the transfer of accounts (Br. Op. p. 17) has not the slightest relevancy to the preparation of the 990 returns. This fact, if it be a fact, is not a circumstance which in any way indicates that petitioner saw or had anything to do with the 990 returns, nor is this a fact which would cause the 990 returns to be incorrectly made.

(c) The monthly financial statements which petitioner saw (Br. Op. p. 18) were not prepared in a manner which would indicate to petitioner that McDonald was making improper entries on the 990 returns (Tr. 4485-4491; Exs. 804-A, 804-B, 804-C, 805). The key to the erroneous returns was not the status of the bank account of the Building Association, but the record segregation which was being kept by Lindsay (Tr. 4556-58, 5371, 5458-60).

* None of the attorneys who participated in the preparation of the government's brief in opposition was present at the trial.

There is no evidence to show whether Lindsay kept these records incorrectly, or whether McDonald received proper information from Lindsay and then made improper entries. In either event, there is not the slightest evidence that the fault lay in any instructions from petitioner to Lindsay or from petitioner to McDonald.

(d) With respect to Exhibit 805 (Br. Op. p 18) the government should have made it clear that Joint Council No. 28 is a different and separate entity from Joint Council No. 28 Building Association. Thus the work sheet, whatever it contained, had nothing to do with the 990 counts involved here.

(e) With reference to the delivery of the 1951 return to petitioner's office, McDonald specifically testified that he did not deliver it to petitioner, and there is not the slightest circumstance which indicates that it would have come to the attention of petitioner. In fact, the evidence is to the contrary (Tr. 4569-4572, 6882-6883). In any event this return was not filed and the charge relating to it was dismissed. Moreover, what conceivable relevancy could it have to the 1950 return?

(f) Miss Agapoff, who preceded McDonald as the bookkeeper for the Building Association, did receive some instructions from petitioner (Br. Op. p. 16); but she did not testify that petitioner at any time gave her any instructions to make any improper entries either on the books of the Building

Even if it be assumed that appellant or the Building Association did not file a return for the year 1951, it would not support the convictions for the years 1950 and 1952. Where fraud is charged for certain years, evidence of *failure to file* a return in another year does not consittute any proof of fraud for the years in question. See *United States v. Long*, 257 F(2d) 340 (3rd Cir. 1958).

Association or upon the 990 returns (Tr. 5496-5537). Her identification of certain check stubs drawn upon Joint Council No. 28 Legislative Fund is, of course, hopelessly irrelevant (Br. Op. 16) because there is no indication that there is anything improper about the stubs, and in any event, the stubs had nothing to do with the Building Association.

(g) Although Miss Agapoff may have showed McDonald how to keep the books (Br. Op. p. 16) there is no evidence whatsoever that she instructed McDonald to keep the records improperly or, if she did so, that petitioner knew it, or that she had been keeping the records in a manner which would have caused McDonald to keep them improperly, or, if she had been doing so, that petitioner knew it.

(h) The only 990 returns which petitioner ever saw or signed were the 1942 and 1945 returns. If, as the government claims, the 1945 return was false (query whether it was knowingly false), it is certainly too remote in time to constitute evidence that petitioner performed any act with respect to either the 1950 or 1952 returns. Petitioner's objection to the 1945 return should have been sustained (Tr. 5514-5515).

(i) The fact that petitioner signed the 990 returns for other entities (Br. Op. p. 15) is certainly not the slightest evidence that he had any knowledge of the falsity of the Building Association returns. There is no contention that the returns of the other entities were false.

In order to support the verdict in this case, the government would have to rely upon things which the petitioner *did not do* rather than upon acts which petitioner did in fact perform. The evidence affirmatively indicates that petitioner had reason

to believe that Lindsay and McDonald were keeping proper records, and under these circumstances there is not any evidence of knowledge on the part of petitioner that false entries were being made.

It is respectfuly submitted that the petition for certiorari should be granted.

CHARLES S. BURDELL
WILLIAM L. DWYER
Counsel for Petitioner

929 Logan Building
Seattle 1, Washington